

NEW YORK (STATE). SUPREME
COURT. NEW YORK COUNTY.
Victor Herbert, Plaintiff vs.
Universal Talking Machine
Manufacturing Co., Def.
RECORD, 1904

CO 1904
H 304

NEW YORK (STATE). SUPREME COURT.
NEW YORK COUNTY.

Victor Herbert, Plaintiff)
against) CO 1904
Universal Talking Machine) H 304
Manufacturing Company, Defendant)

Complete Case File, January 1904 - October 1904.

Originals are now on deposit
in the Historical Documents
Collection at Queens College.

SIR:
Please take notice that the within is
a copy of an
this day
duly entered and filed in the office of
the Clerk of the

Dated, New York,

Yours, etc.,

NATHAN BURKAN,

Attorney for

The argument of the
within motion is hereby
adjourned to January 21st
1904, same time & place
dated January 16th 1904
Esq.

Attorney for Oliver & Rosenthal
acting for D. H.

The argument of the within motion
is further adjourned to January 25, 1904
same time & place. — January 21, 1904
Oliver & Rosenthal
acting for D. H.

Supreme COURT,
New York County
N.Y. Jan 25th, 1904
Victor Herkert, Jr.
PLAINTIFF,
AGAINST
Universal Talking Machine
Manufacturing Company
DEFENDANT.

Original
Order to Show Cause.

Affidants Summoned
Complaint

NATHAN BURKAN,

ATTORNEY FOR

99 NASSAU STREET,
BOROUGH OF MANHATTAN,
NEW YORK CITY.

To

6.34
A 6

DUE SERVICE OF A COPY HEREOF IS HEREBY ADMITTED

DATED, NEW YORK,

FILED

ATTORNEY.

MAR 11 1904

1904 to 1905 the name of
Oliver & Rosenthal & Company, Inc.
The name of the company
is now changed to
Oliver & Rosenthal & Company, Inc.

avit of Service
Summons and Complaint.

Supreme Court of the State of New York.

Victor Herbert,
plaintiff
against
Universal Talking Machine
Manufacturing Company
defendant.

Trial desired in the County of

New York.

Summons with Notice.

To the above named Defendant:

You are hereby Summoned to answer the complaint in this action, and to serve a copy of your answer on the Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated January 14th 1904

Nathan Burkam

Plaintiff's Attorney

Office and Post Office Address:

No. 99 Nassau Street

Borough of Manhattan, City of New York

Fol. 1.

SUPREME COURT: NEW YORK COUNTY.

-----Z

VICTOR HERBERT, :
Plaintiff, :

-against-

UNIVERSAL TALKING MACHINE MANU- :
FACTURING COMPANY, :
Defendant. :

-----Z

Upon the annexed summons, complaint, affidavits and exhibits duly verified, let the defendant or its attorneys show cause before me or one of the Justices of this Court,

" 2. at Special Term Part I thereof, to be held at the County Court House, in the Borough of Manhattan, City of New York, on the 18th day of January, 1904, at 10.30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why an injunction pendente lite should not be issued herein, enjoining and restraining the defendant, its officers agents and servants, and all persons having notice of the injunction, from manufacturing, selling, exhibiting or offering for sale, circulating or disposing of any machines or records containing the words "By Victor Herbert's Band" or "Victor

" 3. Herbert's Band", or the name of the plaintiff printed or inscribed thereon, and from printing, issuing, publishing, distributing or circulating any pamphlets, circulars or advertisements containing the words "By Victor Herbert's Band" or "Victor Herbert's ^{Band}" or the plaintiff's name in connection with any machines or records, and from using plaintiff's name in any manner in their business or trade or advertisements, or in aid or furtherance thereof, and why the plaintiff should not have such other and further relief in the premises as may be just.

4. Due and sufficient cause therefore appearing, let

service thereof on or before the 16th day of January, 1904,
be deemed sufficient.

Dated, New York, January 1st, 1904.

Samuel G. Brewster
JUSTICE OF THE SUPREME COURT
OF THE STATE OF NEW YORK.

Fol. 1. SUPREME COURT OF THE STATE OF NEW YORK.

-----Z-----
VICTOR HERBERT, :
Plaintiff, :
-against- : Trial desired
UNIVERSAL TALKING MACHINE MANUFACTURING : in
COMPANY, : New York County.
Defendant. -----Z-----

The plaintiff, through Nathan Burkan, his attorney, complains and alleges:

FIRST:- That the plaintiff is a musical conductor and a composer of operas and other music, and has and for a long time has had a high standing in the musical world as a composer and musical conductor, and has enjoyed an extended and high reputation, both in this country and in Europe. That plaintiff was an associate leader with Theodore Thomas, who is conductor of the Chicago Orchestra, and assistant leader with Anton Seidl, who was also a leader of the Metropolitan Opera House Symphony Orchestra, of New York, and is and "Victor Herbert Orchestra" the musical director of "The Pittsburg Orchestra" and has been selected one of the musical conductors of the orchestra of the Philharmonic Society of New York. That among the operas and musical compositions composed by plaintiff are "The Serenade", "The Idol's Eye", "The Fortune Teller", "Wizard of the Nile", "American Fantasie", "Baltimore Centennial March", "Gold Bug March", "Babes in Toyland" and "Babette".

SECOND:- On information and belief, that the defendant is a domestic corporation engaged in the manufacture and sale of instruments for the mechanical reproduction of music and speech, called zon-o-phones, and of the constituent parts of said machines, including zon-o-phone records. That the said records are discs, made of hard rubber or of a similar

Fol. 4. substance, and are engraved with certain lines and indentations, which, when said discs are operated in connection with said machines, produce the sounds of musical compositions or speech. That such records are manufactured from a die or matrix which is prepared by means of a large horn into the opening of which the speech or musical composition is spoken or played, the reproduction of which by said zon-o-phone machine is desired.

" 5. THIRD:- That the defendant, as an inducement to the public to purchase its zon-o-phone machines and zon-o-phone records, has placed on many of said records printed slips, containing the title of the musical composition which will be reproduced by means of said record, followed by the words: "By Victor Herbert's Band". That the impression conveyed by said words to the public and which is intended by the defendant to be conveyed to the public, is that the music which will be produced by means of said records is a reproduction of an actual rendition of the composition named on the slip, attached to the record, by a band of which this plaintiff is the leader, and which is called "Victor Herbert's Band."

" 6. " 7. FOURTH:- That the defendant has extensively advertised and is now extensively advertising said zon-o-phone records and has issued and extensively circulated and caused to be circulated in the State of New York and elsewhere, and is issuing and circulating in the State of New York and elsewhere, pamphlets advertising records of over one hundred musical compositions under the heading "Victor Herbert's Band" to which records slips are attached containing the words "By Victor Herbert's Band" as aforesaid. That some of the records advertised in said pamphlets are designated by the initials "V. H. B." and are preceded by the following explanation, to wit:

"The following key letters are used to designate the artist making the records.

That one of said pamphlets is hereto annexed marked Exhibit "A".

FIFTH:- That the defendant has published and circulated and caused to be circulated in the State of New York, and elsewhere, said advertisements and pamphlets and has affixed said slips to said records containing words indicating that said records were made by Victor Herbert's Band, and has sold records containing said slips in the State of New York and elsewhere, and continues to publish and circulate in the State of New York and elsewhere, said advertisements, and to affix said slips to said records and to sell in the State of New York and elsewhere, records containing said slips, for the purposes of trade, and of advertising and commending its machines and records and for the purposes of deriving profit from such use of plaintiff's name.

SIXTH:- That the defendant did unlawfully use and still continues to use the plaintiff's name in the State of New York and elsewhere, for the purposes of trade and advertising as aforesaid, without having first obtained the plaintiff's consent either in writing or otherwise, and did so use the plaintiff's name and is continuing so to use the plaintiff's name, knowing that it had no right, authority or consent from the plaintiff to do so. That this plaintiff has not at any time given to the defendant, any right or authority to use his name in advertising or commanding their said machines and records or in connection with said records or machines or in any way whatsoever, nor to use any of the said words or statements purporting that the defendant's said records were made by plaintiff or by plaintiff's band, or by a musical organization under plaintiff's direction.

SEVENTH:- That plaintiff is not connected with any musical organization known as "Victor Herbert's Band," and that there is no musical band or organization known as "Victor Herbert's Band," nor has plaintiff authorized any person to

use his name in connection with any musical organization.

Fol. 11. That none of the musical compositions the titles of which are contained on the defendant's zon-o-phone records in connection with the words "By Victor Herbert's Band" and none of the musical compositions, the zono-o-phone records, of which are advertised in the defendant's said advertisements and pamphlets under the heading "Victor Herbert's Band" or in connection with the statement that the same were made by Victor Herbert's Band, have been played, rendered or performed by plaintiff or by any band known as "Victor Herbert's Band", or by any band or musical organization of which the plaintiff is or was the leader or conductor, or in any wise connected, for the purpose of producing the zon-o-phone records sold and advertised by defendant or any of them. That the said words and statements purporting that said zon-o-phone records were made, rendered or performed by plaintiff or by plaintiff's band or musical organization, were inserted in the said slips attached to the zon-o-phone records made and sold by defendant and in the said advertisements and pamphlets were and are a fraud upon the public and that the defendant so inserted the said words in said slips and in said advertisements and pamphlets, knowing the same to be false, and for the purpose of deceiving and defrauding the public and the prospective purchasers of said machines and zon-o-phone records.

" 13. EIGHTH:- That said unauthorized use of plaintiff's name by defendant and the defendant's trading upon plaintiff's professional reputation in its said advertisements and pamphlets and slips attached to its zon-o-phone records was and is injurious to plaintiff's professional standing and reputation and offensive to his feelings. That the said unauthorized use of plaintiff's name by defendant, was and is injurious to the plaintiff's reputation and standing in the musical world in that the plaintiff was and is thereby held out to the public as lending himself to an advertising

scheme, which is generally looked upon in the musical world as unworthy of a musical composer and of a director of first class orchestras. That plaintiff has been informed and verily believes that the music produced by defendant's zon-o-phone machines and zon-o-phone records is poor and inferior music and such as would be produced by musicians of a low grade of skill, and the defendant by causing the public to believe that the music produced by defendant's zon-o-phone machines and zon-o-phone records is a reproduction of music actually played by plaintiff or under plaintiff's direction, has caused and is causing to plaintiff great and irremediable loss of his professional prestige and reputation. That by reason of the premises the plaintiff has been greatly injured to his damage in the sum of Twenty-five thousand (\$25000) Dollars.

" 15. NINTH:- That the continuation of said unauthorized use of plaintiff's name by defendant will more ^{and more} injure the reputation and professional standing of the plaintiff and the income which he derives from his profession.

" 16. TENTH:- That there is no other musician or composer or musical conductor of the name of plaintiff having any repute as a musician, composer of music or musical conductor, and that in the use of the name of Victor Herbert in its said advertisements and pamphlets and in the said slips attached to its zon-o-phone records, defendant refers to and means this plaintiff.

" 17. ELEVENTH:- That plaintiff asks for an injunction pendente lite and for a permanent injunction preventing and restraining said unwarranted, unauthorized and improper and fraudulent use of his name by the defendant. That plaintiff has no adequate and available remedy at law in the premises by any action for damages, inasmuch as the injury is a continuous one and would involve endless litigation, and is of such a nature affecting plaintiff's reputation in places far remote from each other, that its extent could not be measured

or proof of the full measure thereof procured and that plaintiff is remediless at law.

Fol. 18. WHEREFORE, plaintiff demands judgment as follows:

1. That the defendant, its officers, agents and servants be enjoined and restrained from manufacturing, selling, circulating or disposing of any zon-o-phone machines or zon-o-phone records containing the words: "By Victor Herbert's Band" or "Victor Herbert's Band" or the name of plaintiff printed thereon, and from printing, issuing, publishing or circulating any pamphlets, circulars or advertisements containing the words: "Victor Herbert's Band" or the plaintiff's name in connection with zon-o-phone machines or zon-o-phone records, and from using the plaintiff's name in any manner in their business or trade or advertisements, or in aid or furtherance thereof.

2. That the defendant, its agents and servants and all other persons having in their possession any zon-o-phone machines, zon-o-phone records, pamphlets, circulars, advertisements, cuts, dies, plates, stones, prints, proofs, negatives, wax forms and machinery containing the words: "By Victor Herbert's Band" or "Victor Herbert's Band" or plaintiff's name printed or impressed thereon or attached thereto,

" 20/ or purporting to have been produced by Victor Herbert's Band, be required to deliver up the same to be destroyed.

3. That a temporary injunction issue restraining and preventing the said acts during the pendency of this action.

4. That the plaintiff have Twenty-five thousand (\$25000) Dollars damages.

5. That the plaintiff have such other and further relief as may be just, besides the costs and disbursements of this action.

Nathan Burkman,
Attorney for plaintiff,
99 Nassau Street, New York City.
Borough of Manhattan.

Pennsylvania
STATE OF NEW YORK. }
CITY AND COUNTY }
OF NEW YORK }
BOROUGH OF MANHATTAN.)

ss:

Victor Herbert
being duly sworn says, that he is the *plaintiff*,

in this action, that he has read

same
ation

STATE OF PENNSYLVANIA, }
Allegeny County, } ss:

Form 18, C. of C.



I, FRANCIS X. BARR, Clerk of the Court of Quarter Sessions in and for the County of Allegheny, in the Commonwealth of Pennsylvania, the same being a Court of Law and Record, do by these presents Certify that

J. Irvin Green Esquire,
before whom the foregoing *Affidavit*
was taken, and who has hereunto, in his own proper handwriting, subscribed his name, was at that time and is a *Notary Public*

in and for said County of Allegheny, duly commissioned and sworn, and authorized by law of the Commonwealth of Pennsylvania to take affidavits and acknowledgements of deeds for lands and real estate in said Commonwealth of Pennsylvania, and to all whose acts as such due

faith and credit are, and of right ought to be, given throughout the United States and elsewhere. And further, that I am acquainted with his handwriting, and verily believe the signature thereto to be his genuine signature.

I further certify that the foregoing *Affidavit* was taken in accordance with the laws of the State of Pennsylvania.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Pittsburgh,
this *Eleventh* day of *January*, A. D. 1904
Francis X. Barr. Clerk.

Pennsylvania
STATE OF NEW YORK }
CITY AND COUNTY }
OF NEW YORK } ss:
OF ~~allegany~~ }
BOROUGH OF MANHATTAN }
)

Victor Herbert
plaintiff

being duly sworn says, that he is the plaintiff in this action, that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

Sworn to before me this 9th day }

of

January 1904
J. H. Green
Notary Public

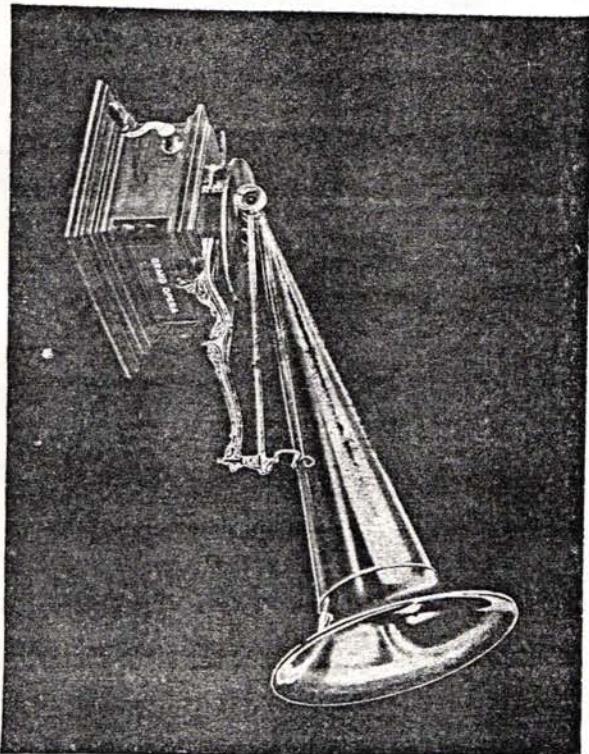
Notary Public,

New York County

My Commission Expires

Jan. 19, 1907.

Dick Cleenck



THE NEW
UNIVERSAL
ZON-O-PHONE

RECORD CATALOGUE

THE NEW ZON-O-PHONE REPERTOIRE

The adoption, in entirety, of Zon-o-phone records has resulted in a radical change in our repertoire, of great importance. Knowing, as none who have not been through the same costly experience can possibly know, just what features to secure, and what by all means to avoid, we now offer in our new, fresh and rapidly increasing stock, the most interesting, entertaining and enjoyable collection of records ever assembled.

The new Universal Zon-o-phone Record, (small fac-simile on cover), Brown Record, Green Label and Gold Letters.

AS A HOME ENTERTAINER

The Zon-o-phone takes its place as the Ideal form of Home Entertainment:

Great artists sing to you.

Great musicians play for you.

Sacred lyrics alternate with coon songs and ragtime melodies.

Operatic **morceaux** with a mother's lullaby.

The funniest men in the world make you laugh.

The most celebrated bands play for you their masterpieces.

Eminent soloists give you the result of years of practice upon a single composition.

Each reproduced with a fidelity of which all art knows no equal. So with the singing voice: Male quartettes are heard in the most harmonious blending; great operatic **prima donnas** illustrate their art with such distinctness that experts can at once name the vocal school in which they were trained.

AUGUST SUPPLEMENT NEW RECORDS

P & C 5574	There's a Lot of Things You Never Learned at School from "The Wizard of Oz"	Q
P & C 5575	Hiawatha from "The Runaways"	Q
P & C 5576	Must You, from "Wizard of Oz"	Q
P & C 5577	Then I'd be Satisfied with Life from "Silver Slipper"	Q
P & C 5578	Re-m-o-r-s-e from "The Sultan of Sulu"	Q
P & C 5579	Dixie Land Two Step	H O
P & C 5580	Medley March of Broadway Hits introducing "Champagne Dance" "Bamboo Tree" "Susie Woosie" "Susie Anna" "Trouble" "Nancy Brown" and "Mr. Dooley"	H O
P & C 5581	Sun Dance	H O
P & C 5582	Hiawatha from "The Runaways"	H O
P & C 5583	A Barbecue in Old Kentucky	I Q
P & C 5584	Rose My Rose Waltz	H O
P & C 5585	My Sulu Lulu Loo from "Sultan of Sulu"	H
P & C 5586	Scarecrow Dance	H O
P & C 5587	A Virginia Christening	I Q
P & C 5588	Anona "Intermezzo"	V H B
P & C 5589	Believe	Alex
P & C 5590	Characteristic Negro Medley	I Q
P & C 5591	Congo Love Song from "Nancy Brown"	Q
P & C 5592	Coon Wedding in Southern Georgia	I Q
P & C 5593	Ephasasa Dill Duet	C&H
P & C 5594	Father Wants the Cradle Back	Q
P & C 5595	Glory from "The Billionaire"	Alex
P & C 5596	Hamlet was a Melancholy Dane from "Mr. Bluebeard"	Q
P & C 5597	Hiawatha from "The Runaways"	V H B
P & C 5598	Hurrah for Baffin's Bay from "Wizard of Oz" Duet	C&H
P & C 5599	Marriage is Sublime Duet	C&H
P & C 5600	Maybe	Alex

VICTOR HERBERT'S BAND

OPERATIC SELECTIONS

S 5000	Antil Chorus from "Il Trovatore"
P & C 5001	Coronation March from "Le Prophete"
P & C 5002	Grand March from "Tannhauser"
C 5003	Hallelujah Chorus from "The Messiah"
P & C 5004	Inflammatus from "Stabat Mater"
C 5005	Miserere from "Il Trovatore"
P 5006	Overture to "Barber of Seville"
P & C 5007	Overture to "Merry Wives of Windsor"
P & C 5008	Overture to "Poet and Peasant"
P & C 5009	Overture to "Pique Dame"
P 5010	Overture to "William Tell"
P & C 5011	Pilgrim's Chorus from "Tannhauser"
C 5012	Quartette from "Rigoletto"
C 5013	Selection from "Attila"
P & C 5014	Selection from "Bohemian Girl"
P & C 5015	Selection from "Carmen"
P & C 5016	Selection from "The Daughter of the Regt"
P 5017	Selection from "Der Freischutz"
C 5018	Selection from "Faust"
P 5019	Selection from "Isle of Champagne"
P & C 5020	Selection from "King Dodo"
P 5021	Selection from "The Serenade"
P 5022	Selection from "Wizard of The Nile"
C 5023	Waltz from "Faust"
P & C 5024	Waltz from "The Serenade"

MARCHES

P & C 5025	A Bundle of Mischief
P & C 5026	All Hail to the Spirit of Liberty
P & C 5027	American Eagle March
C 5028	American Marines' March
P & C 5029	An Ethiopian Mardi Gras
P & C 5030	Arbitration March
P & C 5031	Baltimore Centennial March
P 5032	Boston Commandry March
P & C 5033	Comedy King March
C 5034	El Capitan March
P 5035	Elseeta March
C 5036	Espada March
P 5037	Florodora March
C 5038	Gallant 71st March
P & C 5039	Gold Bug March
P 5040	Hands Across The Sea March
P & C 5041	Imperial Edward March

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VICTOR HERBERT'S BAND (Concluded)

MISCELLANEOUS (Concluded)

P & C 5083	Garry Owen
C 5084	Gloria from "Mozart's 12th Mass"
P & C 5085	Hearts and Flowers
P & C 5086	Home Sweet Home
P 5087	Hunky Dory (Cake walk)
P & C 5088	I Love Thee Columbia
P & C 5089	In Darkest Africa
P 5090	Irish Medley
C 5091	Jolly Fellows (Waltz)
P & C 5092	King of France
P & C 5093	La Marseillaise
P 5094	Lobsters' Promenade
P & C 5095	Medley Introducing "Dixie"
C 5096	Millie Polka (With piccolo solo)
P & C 5097	Morning, Noon and Night
C 5098	Mosquito Parade
P 5099	Moszkowski's Serenade
C 5100	Narcissus
P & C 5101	Nearer My God to Thee
P & C 5102	Old Church Organ
C 5103	Ocean Breezes
P 5104	Policy Sam
C 5105	Possum Hall Rag
P & C 5106	Reminiscences of Scotland
P 5107	2nd Conn. March
C 5108	Salome "Intermezzo"
C 5109	Smoky Mokes
C 5110	Spring Song
C 5111	Star Spangled Banner
P & C 5112	Sympnia (Waltzes)
P & C 5113	Tambour Du Garde
C 5114	Tell Me Pretty Maiden
P 5115	The Troubadour
C 5116	Tone Pictures of the 71st Regt. Leaving for Cuba
P 5117	When Reuben Comes to Town
P 5118	Zamona
C 5119	Zenda (Waltzes)

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VICTOR HERBERT'S BAND (Continued)

MARCHES (Concluded)

C	5042	Invincible Eagle March
P	5043	Jolly Yachtmen March
P & C	5044	King's Daughters' March
C	5045	Liberty Bell March
P	5046	Manhattan Beach March
C	5047	McKinley's Inaugural March
C	5048	Mendelssohn's Wedding March
C	5049	Meeting of the Blue and the Gray
P	5050	New England's Finest March
C	5051	Peace Forever March
C	5052	Prince Henry March
C	5053	Prize Coronation March
P & C	5054	Semper Fidelis March
P	5055	Stars and Stripes Forever
C	5056	23rd Regiment March
P & C	5057	Under the Double Eagle March
P	5058	Universal March
P & C	5059	Up The Street March
P	5060	Willow Grove March
P	5061	Zon-o-phone March

MISCELLANEOUS

P & C	5062	American Fantasie
P & C	5063	Battle of Manila (Descriptive)
P	5064	Before the Mast
C	5065	Blue Grass Beauties
P & C	5066	Blue and the Gray Patrol
P	5067	Calanthe Waltzes
P & C	5068	Carousal Galop
P & C	5069	Cavalry Trot (Descriptive)
C	5070	Chilian Dance
P & C	5071	Coming Thro' the Rye (With piccolo solo)
P & C	5072	Concert Polka (Cornet duet with full band accompaniment)
P	5073	Coon, Coon, Coon
P & C	5074	Could I But Tell You (Trombone solo)
C	5075	Dancing with Ma Baby
P & C	5076	Day By Day
C	5077	Die Wacht Am Rhine
C	5078	Espanita Waltz
P	5079	Fackeltanz
P & C	5080	Falling Leaves
P	5081	Forge in the Forest
C	5082	Grand Fantasie on Scotch, Irish and English Airs

August Supplement No. 1.

**New Universal
Zonophone Records**

(Brown Record with Green Label)

7 inch 50 Cents each, \$5.00 per dozen

9 inch 75 Cents each, \$8.00 per dozen

ORDER RECORDS BY NUMBER ONLY
Always state if you want Parlor or Concert Records by placing a C or P before the Number

I N D E X.

The following key letters are used to designate the artist making the records.

Geo. Alexander	-	-	-	Alex
Arthur Collins	-	-	-	Co
Geo. J. Gaskin	-	-	-	Ga
Hager's Orchestra	-	-	-	H O
Invincible Quartette	-	-	-	I Q
Collins & Harlan Duet	-	-	-	C & H
Pete La Mar	-	-	-	La
Dan W. Quinn	-	-	-	Q
Victor Herbert's Band	-	-	-	V H B
Miss Hallie White	-	-	-	Wh

ORCHESTRA SELECTIONS

By the Zon-o-phone Orchestra (Z) and by Hager's Orchestra (H)

OPERATIC

P & C	5120	Overture to "Fra Diavalo"	H
C	5121	Overture to "Tascredi"	H
C	5122	Polonaise from "Mignon" (With clarinet solo)	H
P & C	5123	Selection from "The Chaperons"	H
P & C	5124	Selection from "Dolly Varden"	H
P & C	5125	Selection from "Emerald Isle"	H
C	5126	Selection from "Fatinitza"	H
C	5127	Selection from "Prince of Pilsen"	H
P & C	5128	Selection from "Sleeping Beauty and the Beast"	H
P & C	5129	Selection from "Twirley Whirley"	H
P & C	5130	Waltz from "Emerald Isle"	H
P & C	5131	Waltz from "Little Duchess"	H
P	5132	Waltz from "Maid Marian"	H

MARCHES

P & C	5133	Clorinda March	H
P & C	5134	Dreamy Eyes March	H
P	5135	Florodora March	H
P & C	5136	Hail to the Bride March	Z
P	5137	He Laid Away a Suit of Gray to Wear the Union Blue	H
C	5138	Independencia March	H
C	5139	King Edward VII March	H
P	5140	Liberty Bell March	H
P	5141	Man Behind the Gun	H
C	5142	March from the "Little Duchess"	H
C	5143	Medley March from "The Prince of Pilsen"	H
C	5144	Our Director March	H
P	5145	San Toy March	Z
P	5146	Under the Flag of Victory March	H

MISCELLANEOUS

P	5147	A Frangesa	Z
P	5148	A Ragtime Skedaddle	H
P	5149	Ain't That a Shame	H
P	5150	Angels' Serenade	H
P & C	5151	Army of Peace	H
P & C	5152	Bachelor Maid's (Waltz)	H
P & C	5153	Bonnie Brier Bush	H

FRENCH SELECTIONS

By Mons. Armand

P & C	5562	Les Gendarmes Qui Passent
P & C	5563	Les Gardes Municipaux

FRENCH SOLOS

By Mons. Boegue

C	5564	Les Rameaux
C	5565	Ninon

GERMAN SELECTIONS

By Herr Von Fealitz

C	5566	Die Stille Rose
P	5567	Still Wie Die Nacht

HUNGARIAN SELECTIONS

By Joseph Ladislay

P & C	5568	Deres a Tu
P & C	5569	Fekete Szem Eszakaja
P & C	5570	Fecskein Fecskein Edes Fecskein
P & C	5571	Kaka toven
P & C	5572	Kakuk Dal
P & C	5573	Megerem Meg Azt az idot

* * *

Order Records by Number Only

Order by Number only. Always state if you want Parlor or Concert Records by placing C or P before the number

SPANISH SELECTIONS

By Mme. Chalia

P & C 5539 El Cafe De Puerto Rico
 P 5540 La Golondrina
 P 5541 Soledad Gitana
 P 5542 Habanera Tu

ITALIAN SOLO

By Mme. Chalia

P 5543 Stella del Norte

ITALIAN SOLOS

By Mme. Frida Ricci

C 5544 Addio De Passato
 C 5545 Ah Bello
 C 5546 Ah Forsee Lui
 C 5547 Aria
 C 5548 Cata Diva
 C 5549 Polonaise from "Mignon"
 C 5550 Simpe Libera

ITALIAN SOLOS

By Alfred Doria

P 5551 Cara Biondina
 P 5552 Ideale
 P 5553 Mattinata
 P 5554 Serenata from "Don Giovanni"

FRENCH SOLOS

By Mme. Frida Ricci

C 5555 Berceuse
 C 5556 Solvejgs Lied

FRENCH SOLOS

By Mons. Du Quesne

P & C 5557 Comme A Vingt Ans
 P & C 5558 Crucifix
 P & C 5559 La Favorite
 P 5560 Le Credo Du Paysan
 P & C 5561 Si Tu M'aimais

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ORCHESTRA SELECTIONS (Continued)

MISCELLANEOUS (Continued)

C 5154	Blue Danube Waltz	Z
P 5155	Cake Walk in Old Madrid	Z
P & C 5156	Chimes of Normandy	H
C 5157	Chocolate Drops	H
P 5158	Creole Belles	H
P & C 5159	Crickets' Carnival	H
P & C 5160	Cupid's Garden	H
P 5161	Darkies' Jubilee	Z
P 5162	Dandy Sandy	Z
C 5163	Halimar	H
C 5164	Happy Hooligan	H
P 5165	Hunting Scene	Z
P & C 5166	I Want To Be A Lidy (Chinese Honeymoon)	H
P 5167	Idolizers	H
P & C 5168	In the Clock Store	H
P 5169	In the Swim (Waltz)	H
C 5170	Jolly Coppersmith	H
P & C 5171	L'Estudiantina (Waltz)	H
P & C 5172	La Paloma	H
C 5173	La Spanola (Spanish waltz)	H
P & C 5174	Limited Express	H
P 5175	Lion Tamer (Galop)	Z
P 5176	Manana (Chilian Dance)	H
C 5177	McKinley's Memorial Record	H
P & C 5178	Medley introducing "Good Old Summer Time," "Bill Bailey," and "Way Down in Old Indiana"	H
P & C 5179	Mill in the Forest	H
C 5180	Midnight Alarm	H
P & C 5181	Mississippi Bubble	H
P & C 5182	Mobile France	H
P 5183	Moon, Moon from "The Toreador"	H
P & C 5184	My Jersey Lily	Z
P & C 5185	Nancy Brown	H
P 5186	Nightingale and the Frog (With Piccolo solo)	H
P 5187	Plantation Pastimes	H
P & C 5188	Pretty Mollie Shannon (Waltz)	H
P 5189	Roselyn Quadrille Fig. 1	H
P 5190	Roselyn Quadrille Fig. 2	H
C 5191	Roselyn Quadrille Fig. 3	H
C 5192	Roselyn Quadrille Fig. 5	H
C 5193	Sea Shell (Waltz with Cornet solo)	H

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IMPERIAL MINSTRELS (Concluded)

C 5473 Laughing Song
 P & C 5474 My Old Kentucky Home
 C 5475 Old Folks at Home
 C 5476 Upon the Golden Shore

DESCRIPTIVE TALKING RECORDS

By Len Spencer and Gilbert Girard

P & C 5477 Auction Sale in Bird and Animal Store
 P & C 5478 Auction Sale of Household Goods
 P & C 5479 A Trip to the Circus
 P & C 5480 Bouncer at the Blazing Rag
 P & C 5481 Chinese Song
 C 5482 Daybreak at Calamity Farm
 P & C 5483 Dog Fight
 P & C 5484 Farmyard Imitation
 P & C 5485 Old Mother Hubbard and other Rhymes
 C 5486 Passing of the Circus Parade

STORIES FOR LITTLE FOLKS

By Len Spencer

C 5487 The Fairy Boat
 P & C 5488 Wedding of the Frog and the Mouse

FUNNY STORIES

By Len Spencer

C 5489 Auction Sale of Household Goods
 P 5490 Making the Fiddle Talk
 P & C 5491 Petro and the Polar Bear
 P & C 5492 Piccolo Player's Reward

YANKEE DIALECT STORIES

By Cal. Stewart

C 5493 A Husking Bee (With violin)
 C 5494 Arkansas Traveler (With violin)
 P 5495 Jim Lawson's Horse Trade
 P & C 5496 Last Day of School at Punkin Centre
 P & C 5497 Uncle Josh at a Camp Meeting
 C 5498 Uncle Josh in a Chinese Laundry
 C 5499 Uncle Josh in a Department Store
 C 5500 Uncle Josh Playing Golf
 P & C 5501 Uncle Josh's Trip to Boston

CORNET AND TROMBONE SOLOS

By Messrs. Kryl and Haines

P & C 5226 Alice Where Art Thou
 P & C 5227 Miserere from "Il Trovatore"
 C 5228 The Palms
 P & C 5229 Tyroleans
 C 5230 Utility Polka

BANJO SOLOS

By Vess L. Ossman

C 5231	Blaze Away
P 5232	California Dance
P 5233	Colored Major
P 5234	Coon Band Contest
P & C 5235	Donkey Laugh
C 5236	Harmony Mose
P 5237	Hot Corn Jubilee
P 5238	Marriage Bells
P 5239	Medley introducing "Josephine, My Joe"
P 5240	Mosquito Parade
P & C 5241	Pearl of The Harem
C 5242	Raggy Raglans
P 5243	Tell Me Pretty Maiden
P 5244	Whoa Bill
P 5245	Yankee Doodle

FLUTE SOLOS

By Frank Mazziotta

P 5246 Aye Maria
 C 5247 Carnival of Venice
 P 5248 Sleep Well, Thou Sweet Angel

PICCOLO SOLOS

By Frank Mazziotta

P & C 5249	Dance of the Hoboes
P & C 5250	Hornpipe Polka
P & C 5251	Humming Bird Polka
P & C 5252	Medley Jig
C 5253	Nigger Fever
P & C 5254	Patrol Comique
C 5255	Ragtime Skedaddle
C 5256	Spring Warbling Polka
P 5257	Tarantelle Sicilienne

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ORCHESTRA SELECTIONS (Concluded)

MISCELLANEOUS (Concluded)

P & C 5194	Selection from "A Country Girl"	H
P & C 5195	Sentimental Tommy	H
P 5196	Southern Roses (Waltz)	H
P & C 5197	Stein Song	H
P 5198	Tell Me Dusky Maiden	H
C 5199	The Warblers Serenade	H
C 5200	Tit'l Serenade	H
P & C 5201	Troubles of the Reuben and the Maid	H
P & C 5202	University Club Lanciers Fig. 1	H
C 5203	University Club Lanciers Fig. 2	H
C 5204	University Club Lanciers Fig. 3	H
P & C 5205	Valse Marie	H
P 5206	Varsouevinne	H
P & C 5207	Violets and Roses	H
P & C 5208	Virginia Reel	H
P 5209	Wedding of the Reuben and the Maid	H
P & C 5210	We're All Good Fellows	H
C 5211	Yale Boola	H
P 5212	Zallah (Egyptian Intermezzo)	H
P 5213	Zon-o-phone (Waltz)	Z

DRUM AND FIFE SELECTIONS

By the National Guard Drum and Fife Corps

Arranged Especially for the Zon-o-phone, Introducing
Trumpet Effects

P 5214	An Election District Parade in N. Y. City
P 5215	Recollections of 1861
P 5216	Red, White and Blue
P & C 5217	Spirit of '76

CORNET SOLOS

By Bohumir Kryl (Kr) and by Emil Keneke (Ke)

C 5218	Answer	Kr
C 5219	Be My Own	Kr
P & C 5220	Carnival of Venice	Kr
P & C 5221	Columbian Fantasie	Kr
C 5222	Down Deep Within the Cellar	Kr
C 5223	Infiammatus "Stabat Mater"	Kr
C 5224	Infiammatus "Stabat Mater"	Ke
P & C 5225	Russian Fantasie	Kr

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RECITATIONS

By Geo. Graham

P 5502	Casey's Address to the "G. A. R."
P & C 5503	Funny Bits
P 5504	George Washington
P & C 5505	How I Got To-Morrow
C 5506	Limburger Cheese
C 5507	My Mother-in Law
C 5508	Negro Funeral Sermon
P 5509	Peculiar Experiences
P & C 5510	Progress of Our Country
P & C 5511	Strenuous Life
C 5512	Stump Speech on Love
P 5513	Talk on Drinking
C 5514	The Trusts
P & C 5515	The Unlucky Man

SPANISH SELECTIONS

By Sig. Antonio Vargas

P 5516	Cancion de Raul
P 5517	Consejos
P & C 5518	De Las Riquezas
P 5519	Discurso Humoristico
C 5520	Don Dinero
P & C 5521	El Gato Negro
P & C 5522	El Saltarello
C 5523	Flor de los Campos
P & C 5524	Habanera Tu
P & C 5525	Himno Bayames
P & C 5526	Himno Nacional Chilena
P & C 5527	Himno Nacional Peruano
P & C 5528	Himno Nacional Mexicano
P 5529	La Golondrina
P & C 5530	La Petronila
P & C 5531	Los Dos Borrachitos
P 5532	Mis Dos Mujeres
P & C 5533	Monologo del Relo de Lucerne
P 5534	Romanza
P 5535	Tango De Ay Guazava
P & C 5536	Tango del Morrongo
P & C 5537	Te Amo
P & C 5538	Viva Espana

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CLARINET SOLOS

By Theo. Pusinelli

P 5258	Cara Nome
P & C 5259	How Can I Leave Thee
P & C 5260	Little Nell
P & C 5261	Long, Long Ago
C 5262	Sanctus (Gounod)

XYLOPHONE SOLOS

By Chas. P. Lowe

P & C 5263	Brilliant Galop
P 5264	Carnival of Venice
P & C 5265	Dancing in The Sunlight
P & C 5266	Du Du
P & C 5267	Fire-Fly Galop
P & C 5268	High and Low
P & C 5269	Medley of Popular Airs
P & C 5270	Mocking Bird
P & C 5271	My Old Kentucky Home
C 5272	Pretty Violets
P & C 5273	Scotch Airs

SONGS IN ENGLISH

We have arranged these songs alphabetically to aid our buyers in selecting records. On the right are given the keyletters of each singer's name.

Joe Belmont	Whistling	Be
James Carroll	Baritone	Car
Mme. R. Cialia	Soprano	Ch
Arthur Collins	Baritone	Co
Will Denny	Tenor	De
Ed. M. Favor	Tenor	Fa
J. J. Fisher	Baritone	Fi
Mina Hickman	Soprano	Hi
Geo. W. Johnson		Jo
Pete La Mar	Yodling	La
Joe Maxwell	Tenor	Max
J. W. Myers	Baritone	My
Mme. Frida Ricci	Soprano	Ri
Cal. Stewart		Stw

P & C 5274	A Little Boy in Blue	My
P & C 5275	All Hail the Power	Fi
C 5276	Alphonse and Gaston	Fa
P & C 5277	And Then I Laughed	Stw

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VOCAL DUETS

By Collins and Harlan (C & H) By Collins and Natus (C & N)

P 5439	Back to the Woods	C&N
P & C 5440	Closing in a Country Grocery	C&H
P & C 5441	Down Where the Würzburger Flows	C&H
P & C 5442	First Rehearsal of the Husking Bee	C&H
P & C 5443	I'm Unlucky	C&H
P & C 5444	Jerry Murphy is a Friend of Mine	C&H
P & C 5445	Marion	C&N
C 5446	Nursery Rhymes	C&N
P & C 5447	On Broadway in Dahomey Bye and Bye	C&H
P & C 5448	Strike On McCraken	C&H
C 5449	The Troubles of the Reuben and the Maid	C&H
P & C 5450	They were all doing the Same	C&H
P & C 5451	Two Reubens in a Tavern	C&H
C 5452	Whoa Bill	C&N
P 5453	You Couldn't hardly notice it at all	C&N

MALE QUARTETTES

As sung by the American Comedy Four (A C F) and the Invincible Quartette (I Q)

P 5454	A High Old Time	I Q
P 5455	A Night Trip to Buffalo	I Q
P 5456	Farmyard Medley	I Q
P & C 5457	I've Gwine Back to Dixie	A C F
P 5458	Kathleen Mavourneen	A C F
P & C 5459	Laughing Quartette	A C F
P 5460	Little Darling Dream of Me	A C F
C 5461	Massa's in the Cold, Cold Ground	A C F
C 5462	My Old Kentucky Home	A C F
C 5463	Old Folks At Home	A C F
C 5464	Popular Airs Medley	A C F
P 5465	Sleighride Party	I Q
P 5466	Steamboat Medley	A C F
C 5467	Sweet and Low	A C F
C 5468	Trip to the Country Fair	I Q

IMPERIAL MINSTRELS

C 5469	Dolly Gray
P & C 5470	Dese Bones Shall Rise Again
P & C 5471	Hear Dem Bells
P & C 5472	High Old Time

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SONGS IN ENGLISH (Concluded)

C	5403	The Sea is the Home for Me	My
P & C	5404	The Train Rolled On	Co
P	5405	Three Women to Every Man	My
C	5406	Ticklish Reuben	Stw
P	5407	Toby I Kind O' Likes You	Co
P & C	5408	Too Late	Fi
P & C	5409	Turkey in the Straw	Co
P	5410	Turkey and the Turk	De
P & C	5411	Uncle Jefferson	Co
P & C	5412	Under the Bamboo Tree	Co
C	5413	Under the Bamboo Tree	Hi
C	5414	Under the Deodar	Hi
C	5415	Violets	My
P & C	5416	Wait at the Gate for Me	My
P & C	5417	Wait at the Gate for Me (With Orchestra)	My
P & C	5418	Waltz Me Down the Alley Sallie	My
P & C	5419	Way Down in Old Indiana	My
C	5420	Way Down Yonder in the Cornfield	My
P & C	5421	Wearing of the Green	My
C	5422	Wedding of the Reuben and the Maid	Co
C	5423	What is Home without Love	My
P & C	5424	When All the World is Young	Car
P & C	5425	When Its all Going Out and There's Nothing Coming In	Co
C	5426	When I was a Dear Little Baby	La
C	5427	When Mother Used to Sing that Song	My
P	5428	When Mr. Shakespeare Comes to Town	De
C	5429	When the Mists Have Rolled Away	Fi
P	5430	When The Troupe Comes Back to Town	My
P & C	5431	Whip-Poor-Will (Whistling)	Be
C	5432	Whistling Coon	Jo
P	5433	Who Threw The Overalls in 'Mrs. Murphy's Chowder	Fa
P & C	5434	Will You Always Love Me Darling	Fi
P	5435	You Give Me Your Love and I'll Give You Mine	My

WHISTLING SOLOS

By Joe Belmont

P & C	5436	American Flag March	
P & C	5437	Independencia March	
C	5438	Over The Waves	

SONGS IN ENGLISH (Continued)

P & C	5278	Anna Let Me Hear from You	De
P & C	5279	Any Old Place I Can Hang My Hat is Home Sweet Home To Me	De
P & C	5280	Army of Peace	My
C	5281	Aria	Ri
C	5282	Baby's Prayer	My
P & C	5283	Bashful Betsy Brown	My
C	5284	Bedouin Love Song	My
C	5285	Belle of Avenue A	Hi
P & C	5286	Bill Bailey Won't You Please Come Home	Co
C	5287	Bye, Bye Ma Honey	Co
P	5288	Calm As The Night	Car
C	5289	Can't You Take My Word	Fa
P & C	5290	Carving The Duck	Jo
C	5291	Charity	Fi
C	5292	Come Down Ma Evening Star	Hi
P & C	5293	Come Down Ma Evening Star	Co
P	5294	Come Out Dinah On The Green	My
P	5295	Could You be True to Eyes of Blue	My
P	5296	Creole Belles	Co
P & C	5297	Cuckoo and the Clock	My
P & C	5298	Dat's De Way to Spell Chicken	Co
P & C	5299	Don't You Remember Nora Darling	Fi
P & C	5300	Down the Line with Molly	Co
P	5301	Emmet's Lullaby	La
C	5302	Emmet's Yodle	La
P & C	5303	Everything at Reilly's must be done in Irish Style	Fa
P	5304	Farmer Boys' Song (Whistling)	Be
P	5305	Flora I Am Your Adora	My
P & C	5306	Fiona	Fi
C	5307	Fudgerology	De
P & C	5308	Girlie with the Baby Stare	My
C	5309	Good Morning Carrie	Co
P	5310	Good Night Beloved	Max
P	5311	Has Anybody Seen Our Cat	Fa
P & C	5312	Heidelberg	My
C	5313	Holy City	My
P & C	5314	Honeysuckle and the Bee	My
C	5315	I Don't Like the Irish	Fa
P & C	5316	If Time was Money, I'd be a Millionaire	Co
P & C	5317	I Just Can't Help from Loving that Man	Co
C	5318	I'm A Philosopher	De

SONGS IN ENGLISH (Continued)

P & C 5319	I'm Getting Awful Lazy	Co
P & C 5320	I'm Getting quite American, Don't You Know	De
C 5321	I'm Old, but I'm Awfully Tough	Stw
P & C 5322	I'm So Tired of Living, I Don't care When I Die	Co
P & C 5323	I'm the Man that Makes the Money in the Mint	De
C 5324	I'm Tired	De
P & C 5325	I'm Tired	My
P 5326	I Must Have Been a Dreamin	Co
P 5327	I Need the Money	Fa
P 5328	In Old New York	My
P & C 5329	In the City of Sighs and Tears	My
P & C 5330	In the Good Old Summer Time	My
P & C 5331	In the Sweet Bye and Bye	Max
P & C 5332	In the Valley of Kentucky	Fi
P & C 5333	I Once did Love a Pretty Yaller Girl	Co
P & C 5334	Its Hard to Leave Your Girl Behind	My
C 5335	I've Got My Eyes on You-oo-oo	My
C 5336	I want Someone to Care for Me	De
P & C 5337	I want to be an Actor Lady	Co
P & C 5338	I want to be the Leading Lady	Co
P 5339	I Was Certainly Dreamin'	De
P & C 5340	I Went to see Them March Away	My
P & C 5341	I Wonder if Your Love will Last	My
P & C 5342	June My June	My
P 5343	Just Because She Made Dem Goo Goo Eyes	Co
P 5344	Just Kiss Yourself Good Bye	Co
P 5345	Katherine (Yodle Song)	La
P & C 5346	Katy Did	My
P 5347	Lust Rose of Summer	Ch
P & C 5348	Lazy Little Maizy Jones	Co
P 5349	Light of the Sea	My
C 5350	Lize	De
P & C 5351	Loch Lomond	Fi
P 5352	Louisiana Louise	Co
C 5353	Ma Ebony Belle	De
P & C 5354	Mandy Won't You Let Me Be Your Beau	Co
P & C 5355	Mary be Wary	Co
P & C 5356	Meaning of U. S. A.	My
P & C 5357	Medley of Emmet's Yodles	La
P 5358	Melinda's Ragtime Ball	Co

SONGS IN ENGLISH (Continued)

P & C 5359	Message of The Violet	My
C 5360	Mick that Sent the Pick	Fa
C 5361	Mona	Fi
P 5362	Mr. Dooley	Fa
C 5363	My Carolina Caroline	Co
P 5364	My Castle on The Nile	Co
C 5365	My Honolulu Lu	Co
P & C 5366	My Lady Hottentot	Co
P 5367	My Little Zulu Babe	Co
P & C 5368	My Maid from Hindoostan	Co
P 5369	My Money Never Gives Out	Fa
P & C 5370	My Princess Zulu Lulu	My
P & C 5371	My Sambo	Co
P & C 5372	My Starlight Queen	De
P & C 5373	My Yankee Doodle Daisy	My
P & C 5374	Nancy	Co
P 5375	Nazareth	Fi
P 5376	Nobody Ever Brings Presents to Me	Max
P & C 5377	Oh Didn't He Ramble	Co
P 5378	Oh Didn't He Ramble	Fa
P 5379	Oh, Oh Miss Phoebe	Co
P & C 5380	On a Saturday Night	Co
P 5381	On a Sunday Afternoon	My
P & C 5382	On Emancipation Day	Co
P & C 5383	Out All Night	De
P & C 5384	Picture in the Sunset Sky	My
P & C 5385	Ping Pong Polly	De
P & C 5386	Please Let Me Sleep	Co
P & C 5387	Rip Van Winkle was a Lucky Man	De
P & C 5388	Rocked in the Cradle of the Deep	My
P 5389	Roll on Silver Moon	La
P & C 5390	Roll on the Ground	Co
C 5391	Rosalie	La
P & C 5392	Rose of Killarney	My
P & C 5393	Sadie Say You Won't Say Nay	Max
C 5394	Schneider Does Your Mother Know You're Out	La
P 5395	She's My Turtle Dove	Max
P 5396	Soldier's Bride	My
P & C 5397	Stay in Your Own Back Yard	Co
P & C 5398	Susie Anna	Co
P & C 5399	Susie Woosie	Co
P & C 5400	Taking a Trip up the Hudson	My
P & C 5401	Tale of the Seashell	My
C 5402	The Man who Plays the Tambourine	Co

SUPREME COURT: NEW YORK COUNTY.

-----Z

VICTOR HERBERT,
Plaintiff,

-against-

UNIVERSAL TALKING MACHINE MANU-
FACTURING COMPANY, :
Defendant.

-----Z

STATE OF PENNSYLVANIA :
COUNTY OF ALLEGHENY : SS

VICTOR HERBERT, being duly sworn, deposes and says:

That he is the plaintiff in the above entitled action.

" 2. That he has read the complaint hereto annexed and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true, and deponent refers to and makes the complaint and exhibits thereunto annexed part of this affidavit.

That deponent is a musical conductor and composer of operas and other music, and has enjoyed an extended and high reputation as a composer and conductor both in this country

" 3. and in Europe. That there is no other musician or composer or musical conductor of deponent's name having any repute as a musician, composer or conductor.

That deponent never gave his consent in writing or otherwise, to the use of his name by the defendant on the zon-o-phone machines or zon-o-phone records manufactured and sold by defendant or on the slips attached thereto or in the advertisements and pamphlets issued and circulated by the defendant, or in any manner whatsoever for the purposes of trade or advertising or for any purpose whatever. That deponent has in no manner given to the defendant any right or

" 4. authority to use his name for the purposes of trade or advertising or for any manner whatsoever.

That deponent is not connected with any musical organization known as "Victor Herbert's Band" and there is no such organization. That no such musical organization nor any organization of which plaintiff was or is the leader, has ever played for the purpose of producing any of the zon-o-phone records manufactured and sold by defendant and designated and held out by the defendant as having been produced by "Victor Herbert's Band" and advertised by the defendant as having been so produced.

Fol. 5.

That as appears from the pamphlet annexed to the complaint, marked Exhibit "A", defendant advertises and holds out over one hundred of its zon-o-phone records as having been produced by "Victor Herbert's Band". That the statements, slips and advertisements issued by the defendant attached to said records or recommending the same, are false and a fraud upon the public, and are issued, circulated and used by the defendant for the purpose of fraudulently palming off upon the public and upon prospective purchasers defendant's zon-o-phone records as having been produced by deponent and by musicians of superior artistic accomplishments, as such are generally known to compose the organizations acting under deponent's direction, while in fact, none of said records has been so produced and the music produced by said records is poor and inferior and such as would be produced by musicians of a low grade of skill.

That the defendant in thus trading upon deponent's reputation by means of said unauthorized and fraudulent use of deponent's name, has caused and is causing to deponent great and irremediable loss of his professional prestige and reputation. That by defendant's said wrongful acts, deponent is held out to the public as lending his name to a fraudulent advertising scheme, and as giving his endorsement to the palming off of poor music upon the public. That deponent's professional standing is principally based upon his

consistent and successful efforts in raising the musical taste of the public by the composition and production of music of a high standard. That any suspicion as to the honesty of deponent's said efforts such as is created by defendant's fraudulent advertising is injurious to deponent's name and reputation and seriously affects the income which deponent derives from his profession. That a continuation of said unauthorized use of deponent's name by defendant, will render the injury to deponent more serious and irreparable.

Fol. 8. That as deponent is informed and verily believes, the defendant threatens to continue to manufacture and sell the zon-o-phone records mentioned in the complaint with the slips containing the words: "By Victor Herbert's Band" and to issue and circulate the advertisements and pamphlets recommending its records as having been produced by "Victor Herbert's Band", so, that deponent will be damaged without any remedy whatsoever, unless the defendant is enjoined from continuing said wrongful use of deponent's name.

9. WHEREFORE, deponent applies for an injunction order restraining, during the pendency of this action, the continuation of the unauthorized use of deponent's name, mentioned and described in the complaint. The reason an order to show cause returnable in less than eight days, is asked for is that the defendant is daily inflicting serious and irreparable damage on the plaintiff.

10. No previous application for such order was made.

Sworn to before me this :

9th day of January 1904. :

John Green
Notary Public

My Commission Expires

Jan. 19, 1907.

Victor Herbert

consistent and successful efforts in raising the musical taste of the public by the composition and production of music of a high standard. That any suspicion as to the honesty of deponent's said efforts such as is created by defendant's fraudulent advertising is injurious to deponent's name and reputation and seriously affects the income which deponent derives from his profession. That a continuation of said unauthorized use of deponent's name by defendant will render

Fol. 8.

STATE OF PENNSYLVANIA, }
Allegeny County, } SS:

Form 18, C. of C.



I, FRANCIS X. BARR, Clerk of the Court of Quarter Sessions in and for the County of Allegheny, in the Commonwealth of Pennsylvania, the same being a Court of Law and Record, do by these presents Certify that

J. Irvin Green Esquire,
before whom the foregoing Affidavit
was taken, and who has hereunto, in his own proper handwriting, subscribed his name, was at that time and is a Notary Public

in and for said County of Allegheny,

duly commissioned and sworn, and authorized by law of the Commonwealth of

Pennsylvania to take affidavits and acknowledgements of deeds for lands and real

estate in said Commonwealth of Pennsylvania, and to all whose acts as such due

faith and credit are, and of right ought to be, given throughout the United States and elsewhere. And further, that I am

acquainted with his handwriting, and verily believe the signature thereto to be his genuine signature.

I further certify that the foregoing Affidavit was taken in accordance with the laws of the State of Pennsylvania.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Pittsburgh,
this Eleventh day of January A. D. 1904

Francis X. Barr. Clerk.

" 10. reparable damage on the plaintiff.

No previous application for such order was made.

Sworn to before me this :

9th day of January, 1904. :

J. Irvin Green
Notary Public

My Commission Expired

Jan. 19, 1907.

John Herbert

Fol. 1. SUPREME COURT: NEW YORK COUNTY.

----- Z

VICTOR HERBERT, :
Plaintiff, :

-against- :

UNIVERSAL TALKING MACHINE
MANUFACTURING COMPANY, :
Defendant. :

----- Z

CITY & COUNTY OF NEW YORK: SS

OTTO SCHREIBER, being duly sworn, says: That deponent resides in the Borough of Manhattan, City of New York.

That on the 16th day of December, 1903, deponent called at the sales rooms of defendant, at No. 24 East 22nd Street, New York City. That the said premises are used by defendant

" 2. for the sale and exhibition of its zon-o-phone machines, zon-o-phone records and zon-o-phone supplies. That deponent saw a large number of zon-o-phone machines and zon-o-phone records in said place. That the person in charge of said premises showed deponent a copy of the pamphlet annexed to the complaint marked Exhibit "A" and told deponent that defendant had for sale all the records enumerated in said pamphlet.

That deponent asked the said person for a number of defendant's records, but was told by said person that the

" 3. said sales rooms were used by the defendant for wholesale sales only and referred deponent to the premises No. 27 East 14th Street, in said Borough and City, as the place where deponent could purchase the defendant's records at retail.

Deponent thereupon called at No. 27 East 14th Street, the place indicated by the defendant's representative, and purchased from one of the persons in charge of said premises, four zon-o-phone records. To the said records, slips are attached containing printed statements reading respectively:

"Universal Zono-phone Record.
No. P. 5021--Band.
Selection---from The Serenade.
By Victor Herbert's Band."

---oo---

"Universal Zon-o-phone Record.
No. P. 5022--Band.
Selection--from Wizard of the Nile.
By Victor Herbert's Band."

---oo---

"Universal Zom-o-phone Record
No. P. 5020.--Band.
Selection--From King Dodo.
By Victor Herbert's Band."

---oo---

"Universal Zon-o-phone Record
No. P. 5015.--Band
Selection--From Carmen
By Victor Herbert's Band."

The person who sold the said records to deponent said that these records had been produced by Victor Herbert's Band. He also showed deponent a copy of the pamphlet annexed to the complaint marked Exhibit "A", and told deponent that all the records enumerated on pages three, four, five and six of said pamphlet, under the heading "Victor Herbert's Band", were records produced by Victor Herbert's Band.

Sworn to before me this

12th day of January, 1904.

: *Atto. Schreiber*

Chas. J. Rosenthal
Notary Public
City Co.

Fol. 1. SUPREME COURT: NEW YORK COUNTY.

----- Z

VICTOR HERBERT, :
Plaintiff,

:
-against-
:

UNIVERSAL TALKING MACHINE
MANUFACTURING COMPANY, :
Defendant.

----- Z

CITY & COUNTY OF NEW YORK:SS

JAMES F. HANNIGAN, being duly sworn, says: That he resides in the Borough of Manhattan, City of New York. That 2. on the 14th day of January, 1904, deponent called at the sales rooms of the defendant at No. 25 East 22nd Street, in the said Borough of Manhattan, City of New York, and the person in charge of said premises then and there sold to deponent three zonophone records made by the defendant, to which slips are attached containing printed statements reading respectively as follows:

"Universal Zonophone Record
No. P. 5020 Orchestra
Selection, from "King Dodo"
By Victor Herbert's Band."

"Universal Zonophone Record,
No. P. 5015--Band
Selection--from "Carmen"
By Victor Herbert's Band."

"Universal Zonophone Record
No. P. 5597--Band
Hiawatha--From "The Runaways"
By Victor Herbert's Band."

That deponent paid One and 50/100 (\$1.50) Dollars, for said zonophone records and received the receipted bill hereto annexed marked Exhibit "B."

4. Sworn to before me this

14th day of January, 1904. :

James F. Hannigan
Henry Vogt
Notary Public
King To. Not filed in V.G. Tr

Form 2.

ALL CLAIMS MUST BE MADE WITHIN 48 HOURS AFTER RECEIPT OF GOODS

TELEPHONE 6148-18TH ST.

CABLE ADDRESS "ZONOPHONE" NEW YORK
LIEBER'S CODE USED

OUR ORDER No.

YOUR ORDER.....

NEW YORK

Jan 14 1903

J. Hannungan

BOUGHT OF THE UNIVERSAL TALKING MACHINE MFG. CO.

24 EAST 22ND STREET

TERMS.....

WE DO NOT INSURE DELIVERY OR SAFE CARRIAGE OF GOODS. THEY ARE AT YOUR RISK OF BREAKAGE AND DAMAGE AFTER SHIPMENT FROM OUR WAREHOUSE.

NUMBER	No. of Pkgs.	Class of Pkgs.	Gross Weight	Net Weight	CONTENTS
					3 7' Records @ .50 ⁰⁰
					<i>Received Payment</i>
					JAN 12 1904
					Universal Talking Machine Mfg. Co.
					By <i>J. Hannungan</i>

SHIPPED TO

VIA:

County of New York ss: James F. Harrigan

being duly sworn, says, that he is over 21 years of age.
And that on the 15th day of January 1904 at No 24 East
22^d Street, Borough of Manhattan, City of New York

he served the summons and complaint in this action, hereto annexed, upon

~~MacNabb~~ The Universal Talking Machine
Manufacturing Company,

~~MacNabb~~ defendant in this action, by delivering a true copy of said summons and complaint to ~~John R.~~
~~John R.~~ defendant personally, and leaving the same with ~~him~~ ~~John R.~~ He further says,
that he knew the person served as aforesaid to be ~~John R.~~ mentioned and described ~~John R.~~
in the said summons as ~~John R.~~ defendant in this action.

Sworn to before me, this 15th day of January 1904 James F. Harrigan

~~Victor Victo~~
The argument in this motion is adjourned to January 22nd 1904, same time place.
Dated January 20. 1904

~~They're~~ ~~on~~ ~~not~~
alleg. for oft

N. Supreme Court.

Victor Herbert
vs.
Universal Talking
Machine Mfg. Co.
affidavits in opposition
to motion for injunction

OLNEY & COMSTOCK,
Attorneys for
Defendant
No. 68 WILLIAM STREET,
NEW YORK, N. Y.

Attorney for _____
hereby admit due and sufficient service of the within.
ated, New York.

RECEIVED
MAY 11 1904

Folio 1 NEW YORK SUPREME COURT.

New York County.

----- x
Victor Herbert :
-against- :
Universal Talking Machine Manufacturing :
Company. ----- x

County of New York, ss:

FRANK A. CRANDALL being duly sworn, deposes and
says:

The above named defendant, the Universal Talking
Machine Manufacturing Company is a New York corporation
which succeeded to the business of a certain other New
York corporation known and incorporated as the "Universal
Talking Machine Company".

I am and have been the secretary of the defendant
company since the organization of the same, and am secre-
tary of the Universal Talking Machine Company, and have
been since the latter part of the year 1899.

" 2 The business of the above companies has been
to manufacture and sell disc talking machines and disc
records. Said business was begun by the Universal Talking
Machine Company in May, 1900, and has been carried on
continuously ever since. In carrying on such business,
the Universal Talking Machine Company invested in a factory
and extensive plant consisting of special tools, moulds,
presses and machinery, which factory and plant has been
developed and enlarged from time to time, and added to, so

" 3 that the same now represents an expenditure of between \$200,000 and \$300,000. The business so carried on has never been a small business, and has grown since its inception, and is now and has been for sometime a very large business.

The machines and records manufactured by the defendant company have been known as "Zonophones" throughout the world, and have been sold throughout the world, and are universally so known by the trade and throughout the world, and have become and have been for some years well known to the public, and particularly to persons interested in music, and musicians, and so favorably known as faithful reproductions of high class music.

" 4 Large sums of money have been expended by the defendant company and its predecessor in business in advertising its said disc records and machines, not only in the United States, but also in foreign countries. Among other things, the defendant has further widely advertised its records and machines through the medium of its catalogues, which have been printed and circulated for a number of years past very widely in the various states of the Union, as well as in foreign countries, said catalogues being issued periodically, and containing, among other things, a complete list of the disc records manufactured by the defendant, with, among other things, the name of the selection engraved upon said record for reproducing purposes, as well as the name of the band or singer or recitationist producing the said record, as the case may be.

The defendant's disc records known as "Zénophones" are flat discs of hard material, such as duranoid, or other like material, being flat and of different diameters varying approximately from 7 inches to 12 feet in diameter, and have inscribed or impressed upon the surface a series of very fine grooves of even depth spirally disposed from near the outer edge to a point near the center of the disc, the said grooves being of even depth and having the sound waves formed in lateral undulations in the sides of the grooves. The record is formed, briefly and generally stated, by the selection desired to be reproduced being spoken or played into a large horn, the sound waves being inscribed or formed upon a disc or plate of soft or semi plastic material through the medium of what is called a sound box arranged at the small end of the horn. The diaphragm of the sound box pulsating under the influence of the sound waves operates a stylus bar, which in turn vibrates a needle or point lightly held in the upper surface of the soft, semi-plastic tablet, and through this medium the sound waves are inscribed in or formed upon the upper surface of the said tablet in spiral form as the tablet is rotated upon a table arranged for the purpose, the groove being of even depth with the sound waves formed in lateral undulations in the sides thereof. A matrix is formed from this soft tablet and the plastic material in the reverse and from this matrix the commercial records are stamped or pressed in any desired quantities, in hard rubber like all other durable material, such as duranoid, etc. The musical selection or recitation, etc., is reproduced from the said commercial record through the

" 9 medium of a machine such as the Zonophone which the defendant sells for the purpose, which, briefly stated, consists of revolving horizontally disposed plate or table upon which the disc record is placed and the sound waves audibly reproduced from the record through the medium of a sound box attached to the small end of a horn. The reproduction in the sound box is produced through the medium of a diaphragm pulsated by a stylus bar and needle attached to the end of the said bar, as the disc record is revolved through the medium of a spring motor. The stylus point being engaged in the spiral groove, is vibrated from side to side by the undulations of the sound waves in the edges of the record groove; the air in the sound box being thus pulsated or set in motion by the pulsations of the diaphragm, the original selection, orchestration, recitation or whatever the same may be is thus reproduced clearly and accurately through the amplifying horn, the machines and records in recent years having been so perfected as to reproduce the original selection most accurately, both as to tone and volume.

" 10

" 11

It has been the practice of this defendant since it has been in business, as well as the practice of its predecessor in business, to be very careful in the selection of its pieces desired to be reproduced and advertised, and this defendant and its predecessor has spent large sums of money in securing desirable talent for the purpose of producing records.

On or about May ¹⁹⁰⁰ ~~1900~~, while this dependent was secretary of the defendant company, it having been his duty to engage proper talent for the making of

" 9 medium of a machine such as the Zonophone which the defendant sells for the purpose, which, briefly stated, consists of revolving horizontally disposed plate or table upon which the disc record is placed and the sound waves audibly reproduced from the record through the medium of a sound box attached to the small end of a horn. The reproduction in the sound box is produced through the medium of a diaphragm pulsated by a stylus bar and needle attached to the end of the said bar, as the disc record is revolved through the medium of a spring motor. The stylus point being engaged in the spiral groove, is vibrated from side to side by the undulations of the sound waves in the edges of the record groove; the air in the sound box being thus pulsated or set in motion by the pulsations of the diaphragm, the original selection, orchestration, recitation or whatever the same may be is thus reproduced clearly and accurately through the amplifying horn, the machines and records in recent years having been so perfected as to reproduce the original selection most accurately, both as to tone and volume.

" 10

" 11

It has been the practice of this defendant since it has been in business, as well as the practice of its predecessor in business, to be very careful in the selection of its pieces desired to be reproduced and advertised, and this defendant and its predecessor has spent large sums of money in securing desirable talent for the purpose of producing records.

On or about May ¹⁹⁰⁰ ~~1900~~, while this dependent was secretary of the defendant company, it having been his duty to engage proper talent for the making of

" 12 records, a certain Anton Schliebusch called on this deponent at the office of the company, and stated that he represented Victor Herbert, the plaintiff in this suit; the said Schliebusch at the same time produced a card of the said Victor Herbert authorizing the said Schliebusch to use his name, Victor Herbert, in connection with a bond which the said Schliebusch was manager for, known as the "Victor Herbert Band". The said Schliebusch also represented to this deponent that while Victor

" 13 Herbert himself at the time was not conducting personally a band, that he was representing Victor Herbert and had the authority from the said Victor Herbert to style the said band of which he was manager, the "Victor Herbert Band". The said Schliebusch solicited the orders of the defendant company through this deponent, to play for it in making its disc records for sale to the trade and the public generally under the name of the "Victor Herbert Band", having the selections played by it marked "By Victor Herbert's Band". This deponent, on behalf of the defendant, in view of the said representations, engaged the

" 14 said band, comprising twenty members, more or less, to play for the defendant for the purpose of producing records and of advertising the same as having been played by "Victor Herbert's Band", and the said defendant paid to the said band through the said Schliebusch, an additional consideration of the sum of \$12 over and above the price paid for the employment of the respective members of the band, for each selection produced and marked "By Victor Herbert's Band".

That the said band has since the said first engagement by the defendant played, up to the present

" 15 time, large numbers of selections for the defendant with the right to the defendant to use the word "Victor Herbert's Band" upon all such records and in advertising the same, and the defendant has paid the said band and the said Schliebusch large sums of money, and has spent several thousand dollars in making matrices for reproducing records of the said selections played by the said band, and has now on hand many thousands of the said disc records made from selections played by the said band, marked "Victor Herbert's Band", as well as several hundreds of matrices made from the said selections, to discontinue the use of which would incur to the defendant a loss of many thousands of dollars.

" 16

As to the knowledge of Victor Herbert that this defendant has been making matrices and records from such matrices and as to the use of said matrices in making such records, and particularly as to the matrices and records which have impressed thereon the words "Victor Herbert's Band", and as to the fact that this defendant has largely advertised in catalogues and has spent large sums of money therein, this deponent states that when the band was first organized and after matrices or dies had recorded the music played by said band and records had been made therefrom, a number of these records were sent to the said Victor Herbert, and as deponent is informed and believes, the said Victor Herbert heard the same played upon either the Zonophone or the Victor talking machines.

" 17

Many, if not all of the band had been members of the band which had been personally conducted by Victor Herbert before he went to Pittsburgh, and some of them thereafter from time to time played in the Pittsburgh

" 18 orchestra led by Victor Herbert, and it is not conceivable, under these circumstances, that the said Victor Herbert should not have known the fact that the said band was playing for this defendant, and that this defendant was making records of the said selections, and advertising the same most extensively, and this deponent and the defendant, since the beginning of the said arrangement, assumed that to be the fact.

This deponent knows of his own knowledge that no complaint was ever received from the said Victor Herbert, the plaintiff, of the action of this defendant now complained of in the bill of complaint, notwithstanding the fact that the defendant has most extensively advertised all of the said selections made by the said band under the name of Victor Herbert" in its catalogues, of which many thousands have been issued periodically from the day of the first arrangement with the said Schliebusch, and in all the said catalogues each of the pieces played by the said band marked "Victor Herbert's Band" was designated in the said catalogue conspicuously as having been played"by Victor Herbert's Band". That the said plaintiff could have failed to have known of the manufacture and sale by this defendant of the said records under the name "Victor Herbert's Band" is practically impossible, as the Zonophone and Zonophone records, including those marked "Victor Herbert's Band", have been very widely sold to the trade and public generally since the said arrangement with the said Schliebusch.

The defendant company never marked or advertised any records under Victor Herbert's name except those made by the said Victor Herbert's band managed by the said Schliebusch.

Sworn to and subscribed }
before me, this 23rd }
day of January, 1904. }

James A. Gitch,
notary Public,
Inster Winchester Co. N.Y.

Frank A. Gandy

Folio 1.

SUPREME COURT,
NEW YORK COUNTY.

VICTOR HERBERT,

PLAINTIFF,

-AGAINST-

UNIVERSAL TALKING MACHINE MANUFACTURING COMPANY,

DEFENDANT.

AFFIDAVIT OF ANTON SCHLIEBUSCH,

ON BEHALF OF DEFENDANT.

" 2. STATE OF NEW YORK,)
CITY AND COUNTY OF) ss:
NEW YORK,)

ANTON SCHLIEBUSCH, being duly sworn, according to law, deposes and says as follows:

I am Forty-nine years of age, and a resident of the City of New York, State of New York. I am now a citizen of the United States, but a native of Germany, and have been in this country for Twenty-one years past. I am by profession a musician, and have been practicing my profession in this country ever since I have been here, and have, in fact, been a professional musician all my life. I have been connected, in this country, with Gilmore's Band for a number of years; also with the Band which was formerly personally conducted by

Victor Herbert, while he was Leader in New York City -- the Twenty-second Regiment Band. I have also been connected with a number of other Bands. The Band led by Victor Herbert in New York was known as "Victor Herbert's Twenty-second Regiment

Fol. 4. Band", and I was connected with the same from 1894 until about 1899, as Sergeant of the Band, and knew Victor Herbert very intimately. My principal duties as Sergeant of the Twenty-second Regiment Band were engaging the Musicians, attending to the payment of their salaries, etc., as well as playing the First Tuba in the Band. Victor Herbert gave up his Twenty-second Regiment Band in New York City in the latter part of 1899, and went to Pittsburgh, for the purpose of conducting the Pittsburgh Orchestra, which he has been conducting until now, and which he is still conducting. Victor Herbert himself has never had a Band since he gave up the Twenty-second Regiment Band.

As before stated, I knew Victor Herbert very intimately, and saw a great deal of him before he went to Pittsburgh, both in the Orchestra and at his home. Shortly before he left for Pittsburgh I secured permission from Victor Herbert personally to use his name in connection with a Band which I was then organizing for the purpose of playing selections for making records for Talking Machine use. I personally spoke to Victor Herbert, shortly before he went to Pittsburgh, about the matter, and asked him verbally whether I could use his name in connection with the Band which I was then organizing, so far as making records for Talking Machines was concerned; that I was desirous of organizing a Band for this purpose. He gave me the permission verbally, and said that I could use his name

in connection with the said Band in making records for Talking Machines, so long as I did it in a good way; that is, as I understood him, so long as I employed good musicians, and played good music. Shortly after this conversation I organized a

Fol. 7. Band, consisting of about Seventeen to Twenty-two musicians,

several of whom had been previously employed in Victor Herbert's

Twenty-second Regiment Band as musicians; and I have continued

the said Band ever since, and have always had in the said

Band at least four or five of the musicians who were formerly connected with Victor Herbert's Twenty-second Regiment Band.

I have also always employed in the said Band good musicians,

and have never played anything but good music in making Talking

Machine records; and, in using the name of Victor Herbert in

connection with the said music and records, have always en-

deavored to keep up the standard of the said music. Mr.

" 8. Victor Herbert was an intimate and good friend of mine, and the

privilege given me to use his name in connection with the said

Band which I organized was in consideration of our mutual

friendship and my previous relations with him. The friendly

relations existing between us was the reason why I did not con-

sider anything more than Mr. Herbert's permission, verbally

given, necessary, and the reason why I did not ask or secure

anything in writing from him. I had many more important

dealings with Mr. Herbert previously, and it was not my custom

to get anything in writing from him at any time. I made very

" 9. little money out of this Band in playing for the making of

Talking Machine records, as I played only for The Universal

Talking Machine Manufacturing Company with this Band, and I only

played for them about once a month. The extra compensation

which I received from The Universal Talking Machine Manufacturing Company when I made records for them with this Band, under the name of The Victor Herbert Band, was a small extra compensation over and beyond the musicians' wages.

While I never had any further communication from Mr. Victor Herbert relative to this matter, I always assumed that he knew that I was making records with this Band under his name for The Universal Talking Machine Manufacturing Company, especially as The Universal Talking Machine Manufacturing Company very widely advertised its records made by this Band under his name.

Fol. 10. It was a great surprise to me when I learned that Victor Herbert had brought Suit against The Universal Talking Machine Manufacturing Company for making these records under his name.

I generally hear the Talking Machine Record which I have made for the defendant reproduced after it is made, and know that all the records which have been made by The Universal Talking Machine Manufacturing Company from selections played by my Band, under the name of Victor Herbert's Band, have been of very superior quality and tone, and should be most satisfactory to a critic. It was always my effort to produce superior records, and such as would do credit to Victor Herbert.

" 11. The arrangements which I made with Mr. Crandall, Secretary of the defendant Company, when I first engaged to make records for him with the said Band, have been, I believe, very satisfactory to the defendant Company, and have been lived up to faithfully and conscientiously. When I made the original arrangement with Mr. Crandall, Secretary of the defendant Company, I told him that I had authority from Victor Herbert to use his name in connection with the Band which I represented

for the purpose of making Talking Machine records, and gave him my card, which, in substance, had printed on it the fact that I represented the said Victor Herbert's band; and it was with this understanding that I made the arrangements with him, and subsequently made records for the Defendant Company.

Arthur Schlesinger,

SWORN TO AND SUBSCRIBED BEFORE ME,)
THIS 21st. DAY OF JANUARY, 1904.)

*Geo. F. Bentley
Notary Public
New York Co.*

Folio 1 NEW YORK SUPREME COURT.

New York County

- - - - - x

Victor Herbert : :

-against- : :

Universal Talking Machine Manufacturing : Company.

- - - - - x

County of New York, ss:

FREDERICK W. HAGER being duly sworn on behalf of defendant, deposes and says:

I am twenty nine years of age, and a resident of the city of New York, state of new York. I am connected with the record making department of the Universal Talking Machine Manufacturing Company, the defendant herein, and have been so connected with it since its organization, and also with the recording department of the Universal Talking Machine Company, its predecessor in business.

I know Anton Schliebusch, the manager of the band known as "Victor Herbert's Band", which has been playing for the defendant company for the purpose of making talking machine records, for the past four or five years. I have always known the said band as "Victor Herbert's Band", and have known that Mr. Schliebusch was formerly connected with Victor Herbert at the time that Victor Herbert was leader of the 22nd Regiment Band in this city, and have also known that quite a number of the musicians employed in the said band known as "Victor Herbert's Band" which has been playing for the defendant company, had been

" 3 previously employed as musicians in the 22nd Regiment Band during the time that Mr. Victor Herbert was leader of the same.

" 4 My connection with the recording department of the defendant company has always been such as to require my presence and attention there whenever records were being made from bands or orchestras, or any musical instruments, and I know that no records made by the defendant company have been marked with the name "Victor Herbert" or "Made by Victor Herbet's Band" except those which have been made by the band of which Mr. Schliebusch is manager, known as "Victor Herbert's Band".

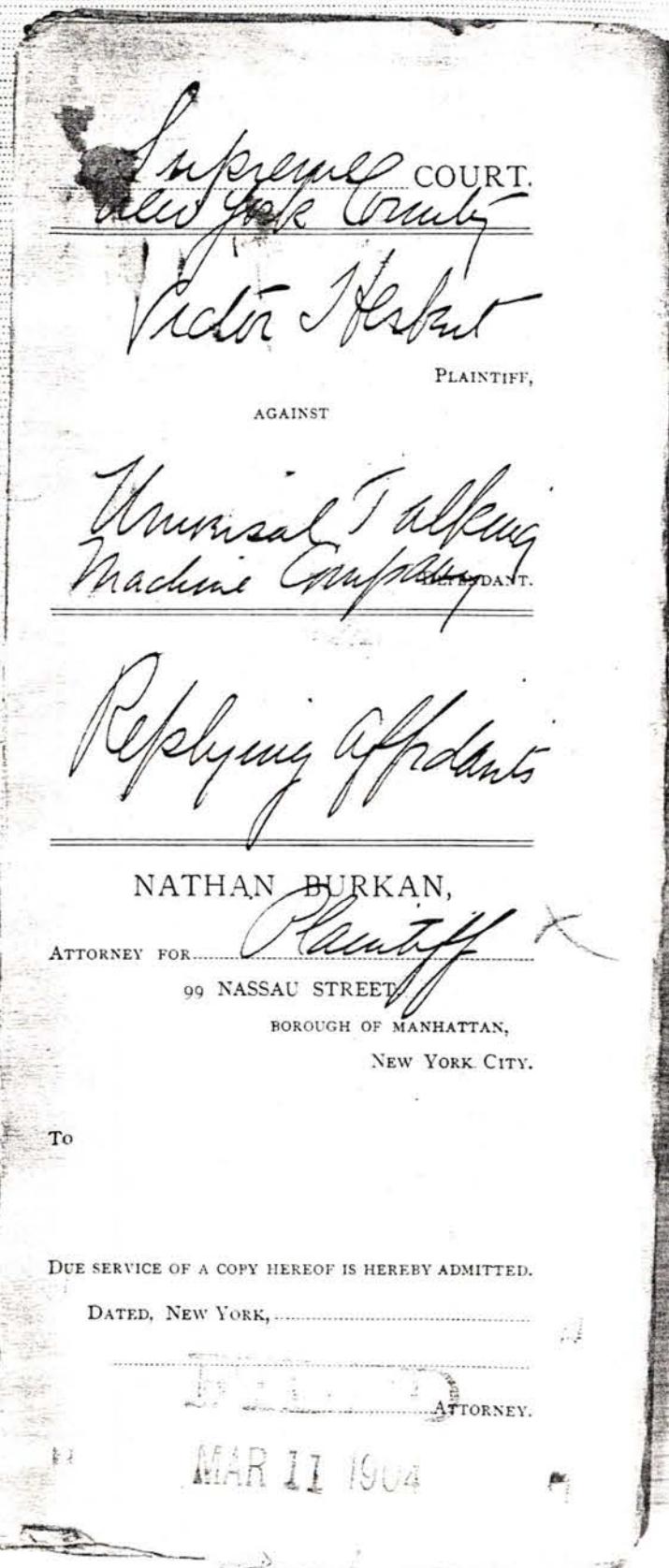
I always understood, as did those connected with the defendant's laboratory, that the said band known as "Victor Herbert's Band" , managed by Mr. Schlisbusch, had the right to the use of Victor Herbert's name, and that we had a full right to mark all records made by the said band with the said Victor Herbert's name.

" 5 I generally heard all the records made by the said band reproduced after they were made, and know that they were all of a high grade and of superior quality and tone, and that none were made by the defendant company under the name "Victor Herbert's Band" which were not of superior quality and tone.

Sworn to and subscribed }
before me, this 21st.: }
day of January, 1904. }

Geo. F. Bentley
Notary Public
New York Co.

Frederick W. Hager



Fol. 1. SUPREME COURT: NEW YORK COUNTY.

-----Z
VICTOR HERBERT, :
Plaintiff, :
-against: :
UNIVERSAL TALKING MACHINE MANU- :
FACTURING COMPANY, :
Defendant. :
-----Z

STATE OF NEW YORK :
COUNTY OF NEW YORK :ss

VICTOR HERBERT, being duly sworn, deposes and says:
I am the plaintiff in this action and have read the opposing
affidavits of Frank A. Crandall, Anton Schliebusch and
" 2. Frederick W. Hager.

That deponent has no knowledge or information what-
ever regarding the alleged transactions, conversations and
arrangements between Frank A. Crandall and Anton Schliebusch
as alleged in the opposing affidavits.

That while deponent was the leader of the "Twenty-
Second Regiment Band" said Anton Schliebusch was the ~~ser~~
geant of the band, the duties of which position were to en-
gage musicians and attend to the payment of the salaries of
the members of the band, but that said Schliebusch at no
" 3. time was the business representative of the "Twenty-Second
Regiment Band."

That said Anton Schliebusch never represented this
deponent in any capacity whatever, nor was he the manager
of any musical organization with which this deponent has
been in any way connected. That deponent never authorized
said Schliebusch to use the name "Victor Herbert's Band" or
to use deponent's name in any manner, shape or form in con-
nection with any musical organization, or for the purpose of
producing records for instruments for the mechanical repro-
duction of speech or music, and deponent denies that this

Foll 4. defendant has any right or authority whatever to use deponent's name in connection with any of its records or circulars or advertisements.

That deponent never received any records from defendant or anyone else with deponent's name, or the words "Victor Herbert's Band" inscribed thereon. That said Crandall in his opposing affidavit is careful not to mention who sent the alleged records to deponent, the dates when and where they were sent to. That deponent never saw any records manufactured by the defendant or any of its circulars, pamphlets or advertisements until the latter part of November, 1903. That deponent never gave any card to Anton Schliebusch authorizing Schliebusch to use deponent's name in connection with a band known as "Victor Herbert's Band" as alleged in the affidavit of Crandall. If such card was in fact presented, it was a forgery and was presented without my knowledge or consent.

That this defendant could easily have ascertained, had it so desired, whether the alleged representations made by Schliebusch were true and whether I consented to such use of my name by writing to me regarding thereto. The defendant now seeks to take advantage of its own carelessness and wrong by claiming that it would incur a loss of money if this Court compelled it to discontinue such illegal and fraudulent use of my name. On the other hand, I respectfully ask the Court to consider also that the acts of the defendant are detrimental to my professional prestige and reputation as the conductor of the Symphony Orchestras. The defendant in its circulars, a copy of which is attached to the complaint, advertises the fact that "Victor Herbert's Band" played the following selections: "A Bundle of Mischief" "An Ethiopian Mardi Gras" "Before the Mast" "Carousel Galop" "Coon, Coon, Coon", "Dancing with ma Baby", "Hunkey Dory" (Cake walk) "In Sunny Africa" "Lobsters' Promenade"

Fol. 7. "Mosquito Parade", "Policy Sam", "Possum Hall Rag", "Smoky Mokes", "When Reuben comes to Town", compositions of the class known as "rag-time music" and "coon songs" and of such a character that no ~~legitimate~~ ^{high class} orchestra would play under any circumstances and which tend to hold me up to contempt and ridicule.

That I had no intimation ^{information} or knowledge whatever that the defendant was manufacturing records with my name inscribed thereon until the latter part of November 1903, when Mr.

" 8. Paul Henneberg of the Pittsburgh Orchestra showed me a letter from Mr. Schreiber, whose affidavit is hereto annexed and also a record manufactured by the defendant, and then I immediately instructed my attorney to commence proceedings against the defendant.

Deponent denies that he ever permitted or authorized said Schliebusch to use his name in connection with any band or for the purpose of making selections for records for any talking machine. That said Schliebusch never told me that he was using my name in connection with any band, or that he was playing for a talking machine company, nor

" 9. did I have any knowledge or information whatever that Schliebusch was making records for the defendant under my name, until I read his answering affidavit. That as to the alleged card that Schliebusch claims to have delivered to Crandall, I have never seen it and never authorized said Schliebusch to make it. *I never heard any record with my name miscribed therein played.*

I do not know Frederick W. Hager and do not recollect ever having met him.

Sworn to before me this

26th day of January, 1904.

Henry Hart
notary public
n. y. c.

John Scherbert

Fol. 1. SUPREME COURT: NEW YORK COUNTY.

-----Z
VICTOR HERBERT, :
Plaintiff, :
-against- :
UNIVERSAL TALKING MACHINE MANU- :
FACTURING COMPANY, :
Defendant. :
-----Z

STATE OF NEW YORK :
COUNTY OF NEW YORK : SS

Will 'Ma B. CLAYTON, being duly sworn, deposes and says:
That he resides at Pittsburgh, Pennsylvania, and has been a
resident thereof since 1900. That I am the business manager
of Victor Herbert's Orchestra, of which the plaintiff herein
is the conductor, and have been such since 1900. That during
this period, I have been the business representative of the
plaintiff, have attended to his correspondence and all his
business transactions, and have a knowledge of and am famil-
iar with his business affairs during the aforesaid period.

That I am acquainted with Anton Schliebusch whose
affidavit is annexed to the defendant's opposing affidavits
and have known him since the last twelve years. That said
Schliebusch was a ^{meber} of the Pittsburgh Orchestra, of
which the plaintiff was conductor during the season 1899-
1900. That during said period I met said Schliebusch at
Pittsburgh very frequently and I never heard him or anyone
else mention any "Victor Herbert Band" and never heard him
claim that he was in anyway connected as manager or otherwise
with any "Victor Herbert Band," or that he had a right to use
the name "Victor Herbert Band.". Deponent never heard said
Schliebusch say that he was playing for any company manu-
facturing instruments for the mechanical reproduction of
speech and music.

Fol. 4. That deponent never received from the defendant or anyone else any records, or has ever seen any records of any kind with the words "Victor Herbert's Band" or the plaintiff's name inscribed thereon; nor any circulars or advertisements with the words "Victor Herbert's Band" or containing the plaintiff's name until the latter part of November, 1903, when Mr. Paul Henneberg delivered to Mr. Herbert one of the records manufactured by the defendant, with the words "By Victor Herbert's Band." Mr. Herbert directed me to send the record to his attorney with instructions to
" 5. commence proceedings against the defendant.

Sworn to before me this :
26th day of January, 1904. :



Henry Hart
Notary Public
N.Y.C.

Fol. 1. SUPREME COURT: NEW YORK COUNTY.

-----Z
VICTOR HERBERT, :
Plaintiff, :
-against- :
UNIVERSAL TALKING MACHINE MAN-
UFACTURING COMPANY, :
Defendant. :
-----Z

STATE OF NEW YORK :
COUNTY OF NEW YORK : SS

OTTO SCHREIBER, being duly sworn, deposes and says:
That I reside in the City of New York and have been a resi-
dent thereof continuously during the past thirteen years.

" 2. I have been a member of Gilmore's Band and the 22nd Regiment
Band, of which the plaintiff was the leader for several
years.

That I have known Anton Schliebusch whose affidavit is
annexed to the opposing affidavits, for about ten years;
that said Schliebusch was a member of Gilmore's Band and
the 22nd Regiment Band, during the time that I was connected
with the bands. That I met said Schliebusch very frequent-
ly from the time the plaintiff left the 22nd Regiment Band.

" 3. That I never heard the said Schliebusch claim that he was in
any way connected with any "Victor Herbert Band" as manager
or otherwise, or that he had a right to use the name "Victor
Herbert's Band". I never heard Schliebusch say that he was
playing for any company manufacturing instruments for the
mechanical reproduction of speech and music.

That I never saw any records or discs with the in-
scription "Victor Herbert's Band" or the name of plaintiff
inscribed thereon nor any circular or advertisement with the
words "Victor Herbert's Band" or plaintiff's name inscribed
thereon until the latter part of November, 1903, when my
attention was called to one of the defendant's machines pro-

Fol. 4. ducing selections by "Victor Herbert's Band." I there-
upon wrote a letter to Mr. Paul Henneberg at Pittsburgh, the
first flute player of the Pittsburgh Orchestra, of which
the plaintiff is conductor, & inquiring of him, whether the
plaintiff is playing for phonograph companies, as I heard
a selection played by the defendant's records, purporting
to have been produced by the plaintiff's organization.

Sworn to before me this :
26th day of January, 1904. :

Henry Hark
Notary Public #42
W.Y.C.

Ota Schreiber

OLNEY & COMSTOCK

PETER B. OLNEY.
GEORGE CARLTON COMSTOCK.

LESLIE RICHARD PALMER.

Extended to Jan 28 at noon

66 WILLIAM STREET,
CORNER CEDAR STREET.

CABLE ADDRESS: "PHENCOMSTO."

NEW YORK, Jany. 27th, 1904.

Herbert

vs.

Universal Talking Machine Mfg. Co.

Hon. David Leventritt,
Justice Supreme Court.

Dear Sir:--

A motion for injunction in the above action was argued before your Honor late Monday afternoon. The plaintiff obtained leave to submit additional affidavit on the question of acquiescence. Your Honor directed such affidavit to be served on us by two o'clock on Tuesday, and that the motion papers be submitted at four o'clock yesterday afternoon. No affidavit was served on us at that time. On inquiring at the court at four o'clock our clerk found that three additional affidavits on behalf of plaintiff in support of the motion had been filed with the clerk. Our clerk then went to the office of plaintiff's attorney and obtained a copy of the same, which we did not receive until about 4.30 o'clock Tuesday afternoon.

The additional affidavits of plaintiff relate to other ~~business~~ matters than the question of acquiescence on the part of the plaintiff, and we find that it is necessary to obtain the affidavits of certain musicians in answer thereto. We learn that these musicians will be engaged in their professional duties until about 2.30 o'clock this afternoon, and that we cannot see them and obtain their affidavits until after that time. Consequently, we are unable to submit the case today, and respectfully ask that our time be extended until tomorrow.

Very respectfully yours,

*Olney & Comstock Att
Peter B. Olney Comstock Esq.*

N. Y. Supreme Court.

Victor Herbert

vs.

Universal Talking
Machines Mfg. Co.

Additional affidavits
Opposing motion for injunction

OLNEY & COMSTOCK,

Attorneys for

Defendants

No. 68 WILLIAM STREET,

NEW YORK, N. Y.

Attorney for

hereby admit due and sufficient service of the within.

ated, New York.

RECEIVED

MAR 11 1903

Folio 1 NEW YORK SUPREME COURT.

New York County.

- - - - - x

Victor Herbert :

-against- :

Universal Talking Machine Manufacturing :
Company.

- - - - - x

County of New York, ss:

ORVILLE D. LA DOW being duly sworn deposes and
says:

In the year 1900 I was president of the Universal Talking Machine Company, the predecessor of the Universal Talking Machine Manufacturing Company, and I was the secretary and general manager of the National Gramophone Corporation which sold the goods manufactured by the Universal Talking Machine Company. At that time the Gramophone Corporation was publishing, and had been publishing for some time, and continued to publish for some time thereafter a monthly publication styled "The Gramophone Record", which publication was mailed regularly to the customers of the National Gramophone Corporation, and this publication generally contained the latest news in the talking machines business, the latest records that had been made, and records that might be anticipated, and letters from customers, and testimonials from musical men, and other matters. William T. Hepper was my assistant. He was the assistant treasurer of the National Gramophone Corporation, and among other duties had general charge of this monthly publication.

" 3

At the time that music was being played for the records by a band called "Victor Herbert's Band", led by Mr. Hager, I was told by Mr. Hager that he had an arrangement with one Schliebusch to use the words "Victor Herbert's Band" after the title on the records so made by him for the Universal Talking Machine Company. My recollection is that certain of these records labelled "By Victor Herbert's Band" were sent to Mr. Herbert at Pittsburgh, with a request for an expression of opinion with regard to their quality and character. That an answer came back from Mr. Herbert

" 4 ✓ highly complimentary in character as to the quality and genuineness of tone production of the records. I remember that the letter was so complimentary that the signature of Mr. Herbert to this letter was photo-engraved, and the letter itself was printed in the aforesaid "Gramophone Record", to which was appended this photo-engraved signature of Victor Herbert. The original of this letter was kept on file in the safe in the office of deponent for

✓ several ~~years~~ ^{months}, and was eventually turned over to the Re-

ceiver of the National Gramophone Corporation, which became

" 5 insolvent in 1901. My recollection in this respect is re-

✓ ^{paid} refreshed by a conversation with Mr. Hepper, who is now em-

ployed in the office of Dixon & Eddy, coal merchants,

Whitehall building, New York City. The conversation with

Mr. Hepper refreshed my recollection in regard to the send-

ing of the letter, and the letter from Mr. Herbert, and

he states positively that he handled a commendatory letter

from Victor Herbert and that he caused the same to be

printed in the "Gramophone Record" and read it therein

after publication. He recollects that Mr. Herbert specially

" 6 commended the record entitled "Ocean Breezes", catalogued in the catalogue of the National Talking Machine Company annexed to plaintiff's moving papers, marked "Plaintiff's Exhibit A" on page 5, number 5103.

Sworn to before me, this)
28th day of January, 1904.) *Erville S. Ladd*
Geo. F. Bentley
Notary Public
New York City.

Folio 1 NEW YORK SUPREME COURT.

New York County.

----- x
Victor Herbert :
-against- :
Universal Talking Machine Manufacturing :
Company.

----- x
County of New York, ss:

WILLIAM T. HEPPER being duly sworn, deposes and
says:

I have read the affidavit of Orville D. LaDow,
" 2 verified this day, and what he says therein with regard to
G. F. B. ~~the sending of the records to Victor Herbert and the answer~~ letter
W. H. received from Mr. Herbert commanding ~~the~~ records and the publication of that ~~answer~~ letter over the photo-engraved signature of Mr. Herbert is true, and I distinctly remember the facts.

Sworn to before me, this
28 day of January, 1904.

Geo. F. Bentley
Notary Public
New York Co.

Folio 1 NEW YORK SUPREME COURT.

New York County.

----- x

Victor Herbert	:
-against-	:
Universal Talking Machine Manufacturing	:
Company.	:

----- x

County of New York, ss:

JOHN A. MACNABB being duly sworn, deposes and says:

" 2 I am the manager of the business of the Universal Talking Machine Manufacturing Company, and have had charge of the sale and disposition of records and the manufacture of the matrices prepared to be played by the Victor Herbert band. We have about 350 on hand. Of these 350 about 70 were made subsequent to April 6th, 1903. All of the rest were made prior thereto. We have about 20,000 records on hand which are records pressed from these matrices. Of these records about two thirds of them were pressed prior to April 6th, 1903.

" 3 As to the quality of the music produced by these records, they are all, so far as I know, perfect reproductions of the music as originally played, and are known both in this country and in Europe as the most perfect reproductions in the trade, and in this connection I refer to the testimonials of Edward de Reszke and Mme Sembrich, found in the catalogue which is annexed to the defendant's moving papers. We have many other flattering testimonials from other well known musicians, such as Mr. Conreid, the manager of the Metropolitan Opera House, Paul Plancon, and others.

On this point I state that I was in Pittsburgh on

" 4 January 23rd, and called upon Victor Herbert there, being introduced by a representative of Mr. C. C. Mellon, who has the largest music house in Pittsburgh. I had in the meantime received advices from our office in New York as to this trouble with Victor Herbert. I told him I had come to see him because I did not understand why at this late day he should make this trouble for us, and told him that I believed it was because of a suggestion made to him by some rival of ours in business. That I understood that one Otto Schreiber had made an affidavit in the matter, and that Otto Schreiber was under the control of the Columbia Phonograph Company, our greatest rival in business, and that I believed that that was the real cause of the trouble; otherwise, at this late day, after we had used his name for so many years, he, Victor Herbert, would not have brought this action, and I asked him what the trouble was. He said that his attorneys had instructed him to say nothing to anyone about the matter, and that he would not talk. I asked him if he knew Schliebusch, and told him if a wrong had been done that we were innocent; that we relied upon Schliebusch, and asked him if he knew him. He said yes, he knew him; that he had been connected with his band and also with his orchestra. I asked him if he had given Schliebusch permission to use his name; he said he had not. I told him that then Schliebusch must be a fraud; he said he did not think that, but that he probably had told Schliebusch that he might advertise his past connection with his, Victor Herbert's band, and that Schliebusch might have inferred from that that he gave him permission to use his name; that he did not believe Schliebusch would intentionally do anything dishonest.

" 5

" 6 I then asked him if he objected to the quality of the music played by the records; he said no, he did not;

" 7 he said he did not want his name used without his consent, and that it made no difference to him whether the music was good or bad; that he wanted the use of his name stopped. He then told me that the first he knew of this was in December of 1903, when Schreiber directed his attention to it. I told him that that was strange, because our Zonophones and records had been prominently displayed in Mr. Mellon's store, and in the store of the Pittsburgh Phonograph Company, and also in the music store of Mr. Samuel Hamilton, the latter place being the place where tickets for Victor Herbert's concerts in Pittsburgh were sold, and that if he went into these places, as I knew he did, he must have seen the Zonophone and must have seen his name displayed in connection with them. He said that that might have been so, but that his mind was not impressed with it, and he had not paid particular attention to it, and that he only began to think of it after Schreiber suggested the matter to him.

" 8 As a matter of fact, our Zonophones have been sold very extensively in Pittsburgh, and are prominently displayed in the music stores of that city. During the last year for instance, we have sold from 15,000 to 20,000 records in Pittsburgh alone, a great many of them bearing Victor Herbert's name, and the music houses have a Zonophone upon which they are played, and they are being played there all day long for the purpose of inviting the public to stop and listen to the music, and purchase, and it seems to me a physical impossibility that Mr. Herbert, a frequent visitor to these music stores, should not have heard these records played.

" 9 As to the quality of the music, I have read the last affidavit of Mr. Herbert, verified January 26th, 1904, in which he objects to what he calls "ragtime" music, which he states is of such a character that no high class or-

" 10 chestra would play it. On this point he must know that he is wrong. This so-called "ragtime" music is played by the best orchestras today, and by the best bands in this country and in Europe. It has been played by the Guard Republican of Paris, by the orchestra of the Elysee Palace Hotel, which is well known in Paris for its superior quality of music, and has been played by Sousa's band, numbers of times, Sousa's band being considered the leading band in this country, and there is nothing in that kind of music except the fact that it is popular and except that its melodies are simple, which would tend to hold him, or any other musician, up to ridicule and contempt. As a matter of fact, this is not so; the musical and vocal character of the theme in the so-called "ragtime" music is quite equal to the theme of any music played.

" 11 All the other music reproduced upon our records under the name of "Victor Herbert's Band" is operatic music and as such is not objected to by Mr. Herbert, and in this connection it may be remarked that most of the themes in the so-called "ragtime" music are operatic melodies which are simplified and played without variations, but whose theme is of the same general musical and poetical character as the theme in the original opera from which it is taken.

" 12 As to the care which my company takes in making matrices, and the expense incurred in making the matrices, I state that we expend on the average not less than \$1000 a week upon the matrices alone, and that the amount that we have invested in the matrices in question is about \$7000, in addition to the moneys that we have invested in the records in question. That the care and expense of making these records are well known to all musicians, and must have been well known to Mr. Herbert, and that

" 13 Mr. Herbert, if he were allowed to stop us now, after he had remained so many years quiescent, would damage to this extent; that is to say, Victor Herbert's action in riveting his attention upon our records and matrices bearing his name, after he had been inattentive to the matter so many years, although necessarily having knowledge of it as aforesaid, if permitted by this court to prevent us from making use of the matrices and records which we have already made while Mr. Herbert was, as he calls it, "inattentive", would damage us in an amount not less than \$10,000, as I estimate it.

Sworn to before me, this
27th day of January, 1904.

John A. Maenab
Raymond J. W. Miller
notary Public
New York City

NEW YORK SUPREME COURT.

New York County.

- - - - - x

Victor Herbert :
-against- :
Universal Talking Machine Manufacturing :
Company.

- - - - - x

County of New York, ss:

FRANK A. CRANDALL being duly sworn, deposes and says:

On the question of the knowledge of Victor Herbert that the defendant had been using his name on matrices and records in connection with a band: One Mr. Schliebusch first came to me with Victor Herbert's card; I told him that our custom was when we produced music or musical records purporting to be records of music rendered by some person, or under his instructions, or with his consent, or bearing his name, by musicians playing under his leadership or under the leadership of one deputized or authorized by him for that purpose, to send samples of the records to such person in order that he might test the superior quality of our records and how perfect were our reproductions, and I told him that as soon as samples were made of records I would send them to Victor Herbert. He thanked me very much and said that he would appreciate it if I would send such samples to Mr. Herbert, and he would like some himself. Sometime afterwards, after the first samples had been made, I sent by post, samples to Victor

" 3 Herbert at his address then given me by Schliebusch, and I also gave samples of the music to Mr. Schliebusch. My recollection is that they were sent by post to Mr. Herbert care of Carnegie Hall, Pittsburgh, Pennsylvania.

Sworn to before me, this)
27th day of January, 1904.)

Frank A. Grandine
Raymond J. W. Miller
notary Public
newyork Co.

NEW YORK SUPREME COURT.

New York County.

-----x
Victor Herbert :
-against- :
Universal Talking Machine Manufacturing :
Company.

County of New York, ss:

ANTON SHCLIEBUSCH being duly sworn deposes and
says:

I have read the affidavits herein of Mr. Herbert
verified January 26th, 1904, and of Mr. Clayton, verified
the same day, and of Mr. Schreiber, verified the same day.
In answer to these affidavits I can only repeat what I
have already stated, and that is that Mr. Herbert gave
me permission to use his name in connection with the band ,
that he knew what I was organizing the band for, that is,
to play for records to be used on talking machines, and
that he gave me full permission so to do, and it is true
that he must have known during these past three years that
this band was being played in that way for that purpose.

As to the so-called "ragtime" music of which
Mr. Herbert complains, this is simply popular music which
is played today and has been for many years played by
first class bands, and when I was a member of Mr. Herbert's
band, the 22nd regiment band, and he was the leader of that
band, he frequently played such music. Why the music
should be called "ragtime" I do not know, except that is
very popular, inspiring music. In many cases the theme

" 3 is taken from an opera and simplified to meet the popular taste. However, most of the music that we played were selections from operas.

I never led the band called the Victor Herbert band, but it was led for part of the time by Paul Henneberg, who had been assistant leader under Victor Herbert, and who has since been connected with him in the Pittsburgh orchestra.

Schreiber, who makes an affidavit for Mr. Herbert, also played for sometime in this band called Victor Herbert's Band, of which Mr. Herbert complains. I remember one instance in particular, and that is when we played in 11th street for Mr. Leeds for the purpose of making records for use on talking machines. Mr. Schreiber played the clarionet at that time in the band.

Sworn to before me, this
27 day of January, 1904.

Victor Herbert
Leslie Palmer
Notary Public
W.M.C.

NEW YORK SUPREME COURT.

New York County.

- - - - - x

Victor Herbert :
-against- :
Universal Talking Machine Manufacturing :
Company.

- - - - - x

County of New York, ss:

CHARLES RECH being duly sworn, deposes and says:

I am a musician, and my specialty is the baritone.

Shortly prior to the time when Mr. Herbert went to Pittsburgh I played in his band. I was engaged so to play by Mr. Anton Schliebusch, and the conductor of the band was Mr. Herbert himself. Since that time I have played in other bands called "Victor Herbert" bands which were not conducted personally by Mr. Herbert, in one case where we played for Leeds, a manufacturer of phonograph records, who had an office or laboratory in 11th street. For this I was engaged by Schliebusch. As I recollect the band consisted of 25 or 30 men. The leader of the band was Paul Henneberg, who is assistant manager, or is connected in some prominent way with the Pittsburgh orchestra which Mr. Herbert now leads. I also played in a band called the "Victor Herbert band" for a company which made records, I think the name is the Vitaphone company. The laboratory where we played was in west 24th street, in this city.

The leader of this band was Otto Schreiber, the same person, as I am informed, who makes affidavits for Mr. Herbert in this case. Other members of these bands had also been members of the 22nd regiment band which Victor Herbert had led.

" 3

The relations of Mr. Henneberg with Mr. Herbert are so close that it seems to me impossible that Mr. Herbert should not have known that the members of his band were continuing to play for records under the name of "Victor Herbert's Band".

It is not a fact that Mr. Herbert has never authorized any band to play under his name when he did not lead it. Besides the instances I have already related, I state that three years ago Mr. Henneberg conducted a band which was advertised and called and known as Victor Herbert's Band, but which was not conducted personally by Mr. Herbert, and this band played for a whole season at Terrace Garden, 58th street and Third avenue, in this city, advertising itself as Victor Herbert's band. It is impossible that this could have been done without Mr. Herbert's knowledge.

Sworn to before me this }

17 day of January, 1904. ;

Charles Reck
Leslie P. Palmer
Notary Public
N. Y. Co.

Folio 1. NEW YORK SUPREME COURT,
NEW YORK COUNTY.

-----X
)
)
VICTOR HERBERT,
)
)
PLAINTIFF,
)
)
)
AGAINST
)
)
)
UNIVERSAL TALKING MACHINE MANUFACTURING COMPANY,
)
)
)
DEFENDANT.
)
)
)
-----X

" 2. COUNTY OF NEW YORK, ss:

FREDERICK W. HAGER, being duly sworn, deposes and says:

That he has read the Affidavits herein, verified January 26, 1904, of Victor Herbert, of William B. Clayton, and of Otto Schrieber. That he knows that Mr. Herbert has known for a long time that Bands were playing under his name. That the reason he states he knows it is that it was a matter of common knowledge by musicians, and that musicians played with these bands ~~were engaged by him, that is, by Herbert, with his Band, and~~ who have since been playing in the Pittsburg Orchestra. That

" 3. during one whole season a Band played at Terrace Garden, New York City, called "The Victor Herbert Band", and led by Paul Henneberg, who was Assistant Leader with Herbert when Herbert himself was leading a Band, and who has since been prominent in the Pittsburg Orchestra. That as to playing for Records, within a recent period Records have been made of orchestral selections by an Orchestra known as "The Victor Herbert Orchestra", conducted by Paul Henneberg, as Leader, and necessarily with the

Fol. 4. permission of Victor Herbert, which Orchestra, as such, was at no time led by Herbert, and was only in part made up of musicians from his Pittsburg Orchestra. As to the quality of the records produced by the defendant, they are known to be of the very highest class, and the music is known to be almost a perfect reproduction. As to the quality of the music of which the reproductions are made, the music has been mostly operatic selections. Some of the selections have been what Mr. Herbert calls "rag-time music", but which is simply another name for popular music. This popular music is played by all
" 5. first class Bands, and frequently played by them; and is considered by musicians as first class music; the only difference between it and selections from Sonatas or Operas being that the theme in so-called "popular music" is more pronounced, and more easily discoverable, and often appeals more strongly to the ear of the general public than many of the operatic numbers.

SWORN TO BEFORE ME, THIS

27 DAY OF JANUARY, 1904.

Frederick W. Hayes
Leslie P. Lamm
Notary Public
N.Y.C.

N. Y. Supreme Court.

Victor Herbert

vs.

Universal Talking
Machine Manufacturing
Company

*Additional affidavit
Opposing motion for injunction*

OLNEY & COMSTOCK,
Attorneys for

Defendant

NO. 68 WILLIAM STREET,
NEW YORK, N. Y.

Attorney for

hereby admit due and sufficient service of the within.

ated, New York.

RECEIVED

MAR 11 1904

Folio 1. SUPREME COURT, NEW YORK COUNTY.

-----X
VICTOR HERBERT,)
PLAINTIFF,)
-AGAINST-)
UNIVERSAL TALKING MACHINE MANU-)
FACTURING COMPANY,)
DEFENDANT.)
-----X

STATE OF NEW YORK,)
COUNTY OF NEW YORK,) ss:

" 2. HENRY B. BABBISON, being duly sworn, deposes and says:

I am the President of the defendant herein. The Defendant is amply responsible financially, and able to pay any Judgment that may be obtained against it in this Action.

It has a large Capital invested, to wit: some Two hundred thousand dollars (\$200,000).

I was in Philadelphia yesterday, and I there met a Mr. Childs, who is connected, as a Record Maker with The Victor

" 3. Talking Machine Company, which makes Disc Talking Machines and records, and is in a business similar to that of the defendant Company. Mr. Childs stated that in December, 1898, or the first part of 1899, he made Records from music played by a Band which called itself "Victor Herbert's Band",

and which was led by a man by the name of Schreiber, as Mr. Childs recollects, and which is, as deponent believes, the same Band as is complained of herein. It was not led by Victor Herbert, but was composed of musicians who had, in whole or in part, formerly played in Victor Herbert's Band. There were from Twenty (20) to Twenty-five (25) musicians. One of the pieces that Mr. Childs remembered they played was a piece called "Ocean Breezes Waltz", a piece which had been composed by Victor Herbert. That this Record was made for the Company manufacturing for The National Gram-o-phone Corporation, which Deponent states was The Universal Talking Machine Company; and Mr. Childs further stated that he remembered that Mr. Herbert had given a written testimonial, testifying to the merits of these Records, to the Company, which testimonial was used in their Catalogues, and was also published in magazines which contained the Company's advertisements at that time. Mr. Childs was at that time an employee of the Company. I asked Mr. Childs to make an Affidavit. He said that he would be in New York to-day, and would make one when he got here. He has not yet arrived, and I therefore, because of his absence, and because of the short time limited to the defendant to put in Affidavits, make this Affidavit myself. Mr. Childs is expected in this City to-night, and is expected to be in the city to-morrow morning, when he will make an Affidavit, which will then be submitted to the Court, if not too late.

" 6. SWORN TO BEFORE ME, THIS 28TH }
DAY OF JANUARY, 1904. }
Leslie A. Palmer

Harry B. Peacock.

Nataly Publishing
2.

Supreme Court

Victor Herdt

against

Universal Talking
Machine Co.

Affiant

Arthur Bankan
Alfred Ryff
99 Nassau St.
New York City

MAR 11 1904

Supreme Court
New York County

Victor Herbert
against
Universal Talking
Machine Company

County of New York \$55.

Victor Herbert being duly sworn says. That I have read the affidavits of Messrs. La Torr, Kipper, MacTratt, Thandall, Schleicher, Redy, and Hage and Babson.

I have never seen "The Gramophone Record," nor have I ever received any records from any person, firm or corporation, bearing the words "Victor Herbert's Band" nor have I ever seen such records until November 1903.

I have never written any letter to anyone recommending any records played or produced by "Victor Herbert's Band" nor have I ever seen a fac. simile of such letter. If such a letter, purporting to come from me exists it is a forgery.

I positively ~~do~~ say that I have had no knowledge or information whatever that the name "Victor Herbert's Band" was being used until November 1903.

I know the alleged conversation set forth
in the affidavit of John A. Macdall. That
Macdall called on me & told him that I
was going to New York to conduct the
concerts of the Philharmonic Society of
New York and that I had been out of the
band business for over four years. That
I was conducting symphony orchestras
devoted to high class music and that I
did not propose to allow anyone to hold
me out to the public as being the leader of
or connected with a band playing "Coon,"
"Coon" and music of that character
and that the defendant must stop using
my name, and that he could get further
information from my attorney. Schreiber
and the Columbia Phonograph Company
was not mentioned nor did I say that I
probably told Schreiber that he might
advertise his past connection with my band
and that Schreiber might have ~~inferred~~
from that, that I gave him permission to
use my name or words to that effect. For
ded I say I might have seen my name written
on the defendant's records, but my mind was
not impressed with and that I paid no
attention to it and that I only began to
think of it after Schreiber suggested the
matter "or words to that effect."

Mr. Elton goes into Miller's or Hamlin's
store. The explanation of "rag-time music"
in the defendants' affidavits is ludicrous. No
symphony orchestra of the first class plays
music of that character.

6. After I resigned from the 22nd Regiment
Band, Mr. Paul Henning succeeded
me and I have no knowledge or information
whatever that he or Mr. Adcock ever used
the name "Victor Herbert Band".

I positively state that I never authorized
anyone to use the name "Victor Herbert
Band" nor did I ever consent to such use
nor did I have any knowledge or information
whatever that the name Victor Herbert Band
was being used until November 1903.

Given before me
this 30 of January 1904.

Victor Herbert

Char. A. Douglass

Notary Public Saratoga

Certificate filed in New York City

N. Y. Supreme Court.
Troy County

Victor Herbert,

vs.

Universal Talking
Machine Manufacturing
Company (B. J. Ginnalt)

Additional affidavits
opposing motion for
injunction.

OLNEY & COMSTOCK,

Attorneys for

Defendant

No. 68 WILLIAM STREET,

NEW YORK, N. Y.

To _____

Attorney for _____

hereby admit due and sufficient service of the within.

Dated, New York,

FILED

MAR 11 1904

Folio 1.

SUPREME COURT,
NEW YORK COUNTY.

-----X
VICTOR HERBERT)
)
AGAINST)
)
UNIVERSAL TALKING MACHINE MANUFACTURING)
)
COMPANY.)
)
-----X

COUNTY OF NEW YORK, ss:

ORVILLE D. LA DOW, being duly sworn, deposes and
says:

" 2. I heretofore made an Affidavit herein, sworn to
January 28, 1904, in which I stated that in the year 1900 The
Gramophone Corporation was publishing, and had been publish-
ing for some time, a monthly publication styled "The Gramo-
phone Record," which contained, among other things, Testimonials
from musical men as to records, and that certain of these Re-
cords, made by a Band which called itself "Victor Herbert's
Band", were sent to Mr. Herbert, with a request for an expres-
sion of opinion with regard to their quality and character;
that Mr. Herbert answered, complimenting the same, and that
thereupon this letter was advertised, and the signature of Mr.
Herbert to it photo-engraved. Since that time I have searched
among the papers in the custody of Mr. Daly, the receiver of
The National Gramophone Corporation, for one of these publica-
tions called "The Gramophone record", containing this letter of

1.

Mr. Herbert. I have found, in the possession of Mr. Daly, one of these publications, advertising the records, and containing, among other things, the following letter:

EXTRACT FROM "GRAMOPHONE RECORD," PUBLISHED BY
Fol. 4. THE NATIONAL GRAMOPHONE CORPORATION,
FOR OCTOBER, 1899 -- Top
of First Column,
First Page.

"NEW YORK, SEPTEMBER 30, 1899.

"NATIONAL GRAMOPHONE CORPORATION,
"874 Broadway, City.

"Dear Sirs:

"THIS IS TO CERTIFY, That the following selections were played by my Band at your laboratory, and I find the records to be excellent in every particular.

"Yours very truly,
(Signed) VICTOR HERBERT."

" 5. The signature being photo-engraved from the original letter.

"8001. March, from The Fortune Teller.

"8016. Ah Cupid!

"8017. The President's March.

"8018. Ocean Breezes.

"8019. The Serenade March.

"8020. The American Girl March.

" 6. "8021. Selections from The Serenade."

As stated in my former Affidavit, at the bottom of this letter appears a facsimile of Mr. Herbert's signature, photo-engraved.

Through the kindness of Mr. Edward E. Sprague, Counsel for Mr. Daly, I produce, with this Affidavit, this original publication. The National Gramophone Corporation, to whom the letter was addressed, sold the records which were manufactured by The Universal Talking Machine Company for The National Gramophone Corporation, and for no other domestic customer.

Fol. 7. My former Affidavit was incorrect, in that I therein stated that the Company of which I was then Secretary, to wit: The National Gramophone Corporation, received a recommendation from Mr. Herbert in 1900. It appears from the recommendation itself that I was wrong in the date, and that the date was 1899, in which year I was also President of The Universal Talking Machine Company, and the Secretary and General Manager of the National Gramophone Corporation.

SWORN TO BEFORE ME, THIS

2nd DAY OF FEBRUARY, 1904.

Raymond McMillan
Notary Public
New York Co.

Orville D. Laddow

The Gram-o-phone Record

Vol. 1.

New York, October 10, 1899.

No. 6

VICTOR HERBERT AND THE GRAM-O-PHONE.

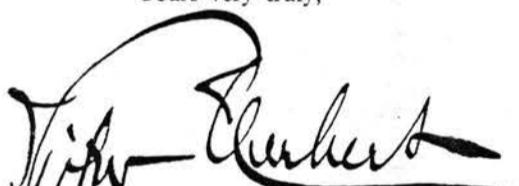
NEW YORK, Sept. 30th, 1899.

NATIONAL GRAM-O-PHONE CORPORATION,
874 Broadway, City.

DEAR SIRS:

This is to certify to you that the following selections were played by my band at your laboratory and I find the records to be excellent in every particular.

Yours very truly,



8001. March from "The Fortune Teller."
8016. Ah, Cupid.
8017. The President's March.
8018. Ocean Breezes
8019. The Serenade March.
8020. The American Girl March.
8021. Selections from "The Serenade."

THE foregoing statement bears special weight, coming, as it does, from a composer who has given to the American public, three new operas within the past six months. One of these works, "The Singing Girl," in which Miss Neilson will appear in New York on October 23d, and which opened early this month in Montreal, is said to surpass in merit both "The Serenade" and "The Fortune Teller." We believe that we may safely promise our readers that the melodies of this work, as well as the catchy music of "The Ameer" and "Cyrano de Bergerac," both of which have been well received, will be reproduced for the Gram-o-phone, and will deserve the same commendation that the band records referred to above have received.

As a composer and as a band master of acknowledged rank and position, Mr. Herbert is too well known to render necessary any meed of praise in these columns. We are sure that the position that he occupies is sufficiently high to afford a guaranty of his judgment and good taste in estimating the quality of reproduced sound.

CONCERT BAND HORN.

A SPECIAL curved brass horn has just been placed upon the market. This horn is the result of a line of very thorough and careful experimenting in the domain of sound reproduction.

It is well known that the tone of a cornet, or a similar instrument, is only produced after having traversed a certain length of peculiarly curved tubing, and that sound waves which are set in motion at the mouth piece are sent out of the bell of the instrument after having followed the form and curves of the instrument itself, in a vastly improved form.

Our laboratory has just produced a horn for the Gram-o-phone, which has this principle as its base, and one can fancy the effect, as a Gram-o-phone sound box is placed upon the horn of the usual shaped band instrument, in order to reproduce a band record. There is a splendid resonant quality which is produced by the waves of sound being thrown back upon each other, thus intermingling and forming richer and fuller tones. The great advantages possessed by the concert band horn in this particular are readily apparent.

Those who hear this horn may prepare themselves for a revelation in the talking machine. Many are familiar with the size of the great brass horns that have been seen on some talking machines; the metal in the new Gram-o-phone horn, if drawn out straight, would measure about nine feet, but by its peculiar shape it takes up little more than the space of our regular straight sixteen inch horn. This horn, if made to special order, would cost \$35, but we have placed the price at \$10 in order to bring its advantages within the reach of all customers.

One will be sent on trial provided order is accompanied by one-half the price (\$5.) We recommend it most confidently to our friends, particularly where they desire to get the splendid volume and distinctive tone of brass instruments in concerted work.

THE GRAM-O-PHONE RECORD

THE GRAM-O-PHONE RECORD

Devoted to the interests of the Gram-o-phone and Gram-o-phone owners. Published monthly, about the 10th of each month, by the

NATIONAL GRAM-O-PHONE CORPORATION
OF NEW YORK

874 Broadway

New York

Branches

Boston	178 Tremont Street
Providence	457 Westminster Street
Philadelphia	13 North Ninth Street
Chicago	161 State Street
Cleveland	Colonial Arcade
Cincinnati	21 and 23 West Fifth Street

THE USUAL RESULT.

The following is a copy of a letter just received at our office in Chicago, which we reprint without comment:

ELKHORN, WIS., Sept. 22, 1899.

National Gram-o-phone Corporation,
161 State St., Chicago, Ill.

Gentlemen:

"I beg to notify you that at the *contest* of Talking-machines, held at our County Fair from Sept. 19th to the 23rd, 1899, there was two Polyphones, several Phonographs and four Graphophones, with your No. 18 Gram-o-phone. Result: the large Graphophone and Polyphone were given the 2nd premium, while the Gram-o-phone was given the 1st premium, which I enclose."

Yours truly,
[Signed] L. MAC DOWELL.

THE DEWEY CELEBRATION.

WE take pleasure in presenting herewith an illustration of the GRAM-O-PHONE BUILDING as it appeared decorated for the recent superb Celebration, commemorating the return of the heroic Admiral Dewey to his native shores.

On the second floor of this building the retail exhibition and salesroom is located; the third floor is occupied by the Executive Offices; fifth floor with the stock and shipping rooms, and on the ninth floor our repair department has its quarters. We present this picture in the belief that many who are owners of Gram-o-phones and have never visited the headquarters in New York, will be glad to see this picture of the home of the Gram-o-phone.



THE BEST EVIDENCE.

HERE is no more flattering testimony of the superiority of the Gram-o-phone over all other talking-machines, than the frequent cases that come to our attention, where, after changing from the Gram-o-phone to some other machine, the person finally is convinced of the superiority of the Gram-o-phone, and consequently buys another.

We learned of an instance of this kind from a recent letter which is reproduced below:

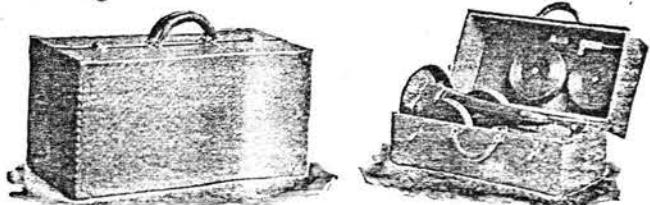
"Last year I had a Gram-o-phone and 50 records. I sold all; but after seven or eight months, hearing other machines, I came back to the Gram-o-phone again. Now I again have a machine (\$18.00 model) and 31 records. I wish a record holder No. 50 (for 50 records), and nine more records, asking you to send those marked 'first,' and only nine out of the selection. (I fear you may be out of some and therefore I give a greater selection). I enclose \$5.75 for the goods. Please ship by U. S. Express Co. without delay."

A GOOD HINT.

IN the course of business it is more or less necessary for buyers to return certain goods, for one reason or another. Not one case in a million is attended in a business fashion. Some buyers simply reship, and say nothing; others reship and mention the fact off-hand in a letter occupied with other matters. The correct way for a dealer is to reship, and send to the party who is to receive them an invoice with all the details, just as if he had bought the goods back, with price, shipping instructions, bill of lading if necessary, and ask for a credit memorandum by return post, then the whole transaction would be well taken care of the goods received, bill checked, price checked, passed to bookkeepers for credit memorandum. All packages should be marked with the name and address of party returning goods. A moment or two detailed attention like this would forestall all possibility of *Mistake* and save much temper, letter writing and troublesome looking-up.—*Exchange*.

THE GEM CARRYING CASE.

IN the past, many owners of Gram-o-phones have been deterred from taking the Gram-o-phone about with them, owing to the inconvenience of carrying the machine, horn and records each in separate packages; all this, however, has now been obviated by our combination carrying case, "The Gem," price \$6.00. Some time and thought have been spent to devise a thoroughly convenient and compact case, and the appreciation of our friends who have tested the case is certainly very flattering.



As will be seen in the illustrations, "The Gem" case holds the Gram-o-phone complete, with horn, sound-box, etc., and space for extra sound-box, together with as many as eighty to one hundred records. It is covered with duck, painted to render it waterproof. A feature of this case is that the machine may be played without taking it out of the case.

THE GRAM-O-PHONE RECORD

3

THE GRAM-O-PHONE IN THE KLONDIKE.

A portion of a personal letter from Dr. F. N. C. Terauld, formerly of this city, is published below with the permission of the gentleman to whom it was addressed; we believe it will interest our readers.

YUKON RIVER, RAMPART CITY, }
REGION OF THE KLONDIKE. }

Dear Friend:

"We arrived here after the hardest trip of my life and have gone into permanent winter quarters. Every man was apportioned to the number of logs he would be obliged to cut and drag in to make our large and commodious cabin. We paid \$16.00 a piece for our windows and \$50.00 for our cook-stove, so you see that things are rather high.

By insisting upon it and sticking to my first idea that my Gram-o-phone and Records should be one of the first things transported, I and all of the fellows are reaping enjoyable benefit from the company that this great old machine gives us. When we have come in, off the trail, with spirit thermometer marking 64 degrees below zero, on three nights in the week, I start the Gram-o-phone with a given number of records; so we have Sousa's marches, rag time and quartets, away up here close to the Arctic Circle. This old machine is worth its weight in gold for dispelling the blues, making us all feel that we are in close touch with civilization.



Will you please go to Mr. G. L. Goodday, Mgr., 14th St. Branch, and have him express to me one dozen records of the latest songs that the New York public is now enjoying, and get them off early, so they will reach St. Michaels before navigation is closed. In all my travels through foreign lands, I have never seen anything so interesting and wonderful as the effect of the Gram-o-phone upon the Siwash Indians that inhabit this

region. The first fears are suddenly turned into rapt attention and finally great glee, as accompanying photo will show. Let me impress upon you again the importance of the shipping of the records and needles at an early date, that we may receive them to cheer the long nights of the coming winter."

[Signed] FREDERICK N. C. TERAULD, M. D.
Formerly of 201 W. 87th St., New York.

A TIMELY TALK WITH GRAM-O-PHONE DEALERS.

WITH the Fall trade at hand, and the approach of the holiday season, we venture to remind Gram-o-phone dealers of the advantage of having their stocks in A1 shape, so that orders may be filled promptly and to the satisfaction of the buyers.

We are anticipating a very large demand for Gram-o-phones and records. We have every reason to look for an unprecedented demand; to provide for this we have spent larger sums on talent and record making than ever before.

The well earned and deserved superiority of the Gram-o-phone over all other talking machines, is in itself and by itself, going to bring into the fold of Gram-o-phone owners, a large number of new friends of the machine.

This and other facts, chiefly the liberal policy that has been followed in giving publicity to the merits of the Gram-o-phone, justify us in politely urging upon dealers the following questions:

1. Are you keeping the Gram-o-phone constantly on exhibition in a conspicuous part of your store?
2. Are you realizing the most from the Gram-o-phone in the matter of attracting trade to your store?
3. Are your Gram-o-phones in perfect running order?
4. Does the sound box reproduce clearly and with distinctness?
5. Is your stock of records in attractive condition, and does it include our up-to-date and popular records?
6. Are you familiar with the advances that have been made in the construction of convenient carrying cases? We have a complete line, attractive in appearance, especially designed with reference to ease in carrying, and the care of the machine.
7. Have you a sufficient supply of catalogues and other literature for general distribution? Quantities will gladly be furnished to any dealer on request.

As tastes differ, it is always advisable, but particularly at this season, to have a stock of records of general assortment on hand. So if one would secure the largest trade in the Gram-o-phone line, they must be prepared to cater to the various tastes in records; sales are lost where a dealer does not keep a stock that includes selections of every class.

A GRAM-O-PHONE WINDOW.

The Spalding-Bidwell Co., of 29-33 W. 42nd Street, New York, have opened a department devoted exclusively to the sale of the Gram-o-phone. They have filled their West window with machines and the display is attracting considerable attention from passers-by upon that thoroughfare. Visitors to the city, coming in by the Grand Central Depot, will find this a convenient point for obtaining Gram-o-phones and supplies.

THE GRAM-O-PHONE RECORD.

During the past month the following records have been added to our stock:

UNITED STATES MARINE BAND OF WASHINGTON, D. C.

0519—Dancing in the Dark.
0520—You've Got to Play Rag Time. [Medley.]

SCHUBERT BRASS QUARTETTE.

0453—World's Fair March.
0454—Hunter's Farewell.
0455—The True German Heart.
0456—The Stars.
0458—A Pretty Girl.
0459—Parade March.

BRASS QUARTETTE.

0389—Forsaken.
0390—Rheinlied.
0391—Hunter's Gallop.

SAXOPHONE SOLOS BY JEAN B. H. MOEREMANS SOLOIST OF SOUSA'S BAND.

These records are among the best Saxophone records ever made by us—the tone is full and natural, and we recommend them to our trade.

0521—Pericon. [Baile Nacional del Uruguay]
0523—Polka Militar.
0524—La Giralda.

BARITONE SOLOS BY MR. S. H. DUDLEY.

0463—When Dewey Comes Sailing Home.
0464—Nancy.
0466—Yuba Dam.

HAYDN QUARTETTE.

021—Nearer My God To Thee.
0382—Where Is My Wandering Boy To-night?
0383—Onward, Christian Soldiers.

FRENCH SOLOS BY MONS. B. BEGUE.

This is a beautiful baritone voice—one of deep rich quality. It is a new voice in the talking machine world and a very superior one.

0490—Hosanna.
0491—Charles VI.
0492—La Marseillaise.
0493—Toreador de Carmen.
0494—Les Rameaux.
0495—Les Huguenots.

SPANISH SOLOS BY MISS EUGENIE FERRER, SOPRANO.

0446—El Vestido Azul.
0447—Sobre Los Olos.
0448—Los Politicos.
0450—Triste.
0451—El Gato.
0452—La Tejedora de Nanduti.

SPANISH SOLOS BY MR. CARL BERNHARD, BARITONE.

0468—La Mononita.
0469—La Gitana.
0470—Teresita Mia.
0471—Bolero des Matadores.

GERMAN SOLOS BY MR. CARL BERNHARD.

0472—Es hat nicht Sollen Sein.
0473—Auch ich War ein Jüngling.
0474—Grad aus dem Wirthshaus.
0475—In Dunkler Nacht.

MISCELLANEOUS.

0181—Whistling Rufus. [Sousa's Band.]
0100—Martha Jane Green. (with clogs) [Len Spencer.]
0111—Mother Goose Rhymes. [Len Spencer.]
0460—The Mocking Bird. [Whistling Solo by Harry Gibbs.]
0526—Himno Nacional Del Uruguay. [Tenor Solo with Saxophone Obligato.]
0327—La Lansonet Polka. [Piccolo Solo by Geo. Schweinfest.]
0532—Ma Honey Lou. [E. M. Favor, Tenor.]
0478—Joy Bells and Come Ye Disconsolate. [Chime Bells.]
0498—Petit Noel. [French Duet by Mons. and Mme. Begue.]

The following records appearing in our June catalogue have been withdrawn from stock:

VOCAL SELECTIONS

021—Nearer My God to Thee.
0160—Smoky Mokes. [By Dan W. Quinn.]
3672—Holy City. [By Miss Dorothy Yale.]
4296—Who's Dat Said Chickens. [By Imperial Quartette.]
1960—Kiss Me, Honey, Do.
154—I Long to See the Girl I Left Behind. [By John Terrell.]
692—Married Life. [By George Graham.]
1303—Chanson Politique. (Madame Angot) [By Mlle. Laure Libra.]
1309—La Veritable Manola. [By Mlle. Laure Libra.]
1846—Serenata Don Giovanni. [By A. Del Campo.]
1880—The Man Who Broke the Bank at Monte Carlo. [By John Terrell.]
1901—We Fight To-morrow, Mother. [By Albert C. Campbell.]
1866—Calvary. [Sung by Albert C. Campbell.]
0137—Because
019—She Was Bred In Old Kentucky. [By Albert C. Campbell.]
022—The Bridge. [By Haydn Quartette.]
0324—Because I Love You Dear. [Soprano solo by Miss Edna Florence.]
669—A Day in a Country School. [By Geo. Graham.]
1809—My Little Chorus Girl. [By J. W. Myers.]
1817—Yer Baby's a Coming to Town. [By John Terrell.]
1890—Widow Nolan's Goat. [By John Terrell.]
4293—The Tack [By Haydn Quartette.]

INSTRUMENTAL.

3453—La Tamba del Simdizio. [Cornet Solo by Bohumir Kryl.]
3456—Battle Cry of Freedom. [Cornet Solo by Bohumir Kryl.]
441—Hand Organ. [Number 5]
0172—Blue Bells of Scotland.
478—Patriotic Medley. [Banjo Duet]
705—Spirit of '76. [Drum and Fife]
3253—Du, Du [Xylophone Solo]
3264—Galop Brilliant. [Xylophone Solo]
3414—Dreams. [Cornet Solo by Henry Higgins]
3903—Paria Romance. [Saxophone Solo by Jean Moeremans.]
0173—Home, Sweet Home
3454—Polka Tiro'ese. [Cornet Solo by Bohumir Kryl.]
0260—The Garden of Flowers. [Euphonium solo by Sig. Mantia.]
0373—A Bunch of Rags [Banjo solo by Vess L. Ossman.]
0435—At a Georgia Camp Meeting. [Whistling solo by Mr. Harry Taft.]
3411—Answer. [Cornet solo by Mr. Henry Higgins]
3442—American and Spanish Bugle Calls

"WHEN DEWEY COMES SAILING HOME."

HERE is a peculiar timeliness in the Gram-o-phone Record No. 0463, which was received from our factory just as the Nation's Hero was about to enter the harbor of New York, and to receive from the expectant metropolis a demonstration of the country's homage and pride, as has rarely, if ever, been extended to any man. "When Dewey Comes Sailing Home Again" is a capital record; it is sung in a clear and distinct tone—every word is readily understood. The cheers which are introduced, give it a realistic value, and altogether it is a record that should be in the collection of every Gram-o-phone owner all of whom we believe, delight to honor Admiral Dewey.

An author, who was his own publisher, advertised a book of his as follows: "Send one dollar for my new book with autograph." Shortly afterward he received this order from a rural reader: "I inclose one dollar. If the autograph is one of them talkin' machines, send it on by freight. I don't want the book."—Atlanta Constitution.

Folio 1. SUPREME COURT, NEW YORK COUNTY.

VICTOR HERBERT,

PLAINTIFF,

-AGAINST-

UNIVERSAL TALKING MACHINE MANU-
FACTURING COMPANY,

DEFENDANT.

STATE OF NEW YORK, :
: ss.
COUNTY OF NEW YORK.:

CALVIN G. CHILD, being duly sworn, deposes and says:-

I am in the employ of the Victor Talking Machine Company as manager of the Recording Laboratory. In December 1898 or the early part of 1899 I was in charge of the Laboratory of the ~~Universal Talking Machine Company~~ ~~which was merged into~~ the National Gramophone Corporation, New York City. This Laboratory was situated at 26 West 24th St., and about this time an engagement was made for the Company by Mr. F.S. Potter, with Victor Herbert, the plaintiff herein. Victor Herbert sending as a representative Mr. Schreiber, to arrange the details of this engagement. The band played at the above mentioned laboratory on West 24th St., and after the engagement was finished the records were sent to Mr. Herbert, and he expressed his approval of them in a written testimonial to the Company, which was published in the catalogues of the Company, and in many of their magazine advertisements at that time. I was informed and believe that all the musicians who played in the band, which made the records, bearing the name of Victor Herbert's band were musicians

who were members of Victor Herbert's band during the year 1899, which band played at Manhattan Beach during the summer of 1899.

SWORN TO BEFORE ME, THIS 29TH:
DAY OF JANUARY, 1904.

C. J. Childs.

*Leslie R. Palmer
Notary Public
N.Y.C.*

N.Y. Supreme COURT.

Victor Herbert

114

PLAINTIFF,

AGAINST

*Universal Talking
Machine Manufacturing Company*

DEFENDANT.

Affidavits

NATHAN BURKAN,

ATTORNEY FOR *plaintiff*

99 NASSAU STREET,

BOROUGH OF MANHATTAN,

NEW YORK CITY.

To

DUE SERVICE OF A COPY HEREOF IS HEREBY ADMITED.

DATED, NEW YORK,

FILED

ATTORNEY.

MAR 11 1904

Fol. 1. SUPREME COURT: NEW YORK COUNTY.

----- Z

VICTOR HERBERT, :
Plaintiff,

:
-against-

UNIVERSAL TALKING MACHINE :
MANUFACTURING COMPANY, :
Defendant.

----- Z

STATE OF NEW YORK :
: SS:
COUNTY OF ERIE ;

VICTOR HERBERT, being duly sworn, says: I have read the affidavit of Orville D. La Dow, verified the 2nd day of February, 1904. I have never seen the issue of "The Gramaphone Record" therein referred to or any other issue of said paper, nor a fac-simile of the letter alleged to have been written by me. That a copy of said publication containing a fac-simile of the signature ^{to the} ~~alleged letter~~ purporting to have been written by me was not served upon my attorney with the affidavits, and I could not inspect the one filed with the Court as I left New York City to go on a tour with "The Pittsburgh Orchestra" on the 31st day of January, 1904, and the affidavits of Messrs. La Dow and C. G. Child were served on my attorney on the 2nd day of February 1904, as I am informed by my said attorney.

I have no recollection whatever of having ever signed the original letter, a copy of which Mr. La Dow claims was published in the "Gramaphone Record." I have no recollection whatever of having received any records from the Gramaphone Corporation. I am positive that I never received from said company or from the defendant, or from the defendant's predecessor any records marked with my name or with the description "Victor Herbert's Band" and that I never expressed in writing or orally my approval of any records so marked.

Fol. 4. I have read the affidavit of Calvin G. Child, verified January 29, 1904. The statement therein contained that an arrangement was made by Mr. Potter with me to send Mr. Schreiber and have him play in the Laboratory of the National Gramaphone Corporation is untrue. I never made any such arrangement with Mr. Potter or any other representative of the National Gramaphone Corporation, nor did I in any way consent to the use of my name or of the name "Victor Herbert's Band" by any band playing at the Laboratory of said Corporation. I recollect that during the time when I was leader of the Twenty-second Regiment Band, my permission was asked by some of the musicians belonging to that Band to use the name "Victor Herbert's Band" at some Laboratory for the purpose of making phonograph records of some selections from my compositions, and that I expressly forbade them to use that name. I have since been informed by Mr. Schreiber that he and the other members of the Twenty-Second Regiment Band who played at the Laboratory of the National Gramaphone Corporation did not use the name "Victor Herbert's Band", but played selections from my compositions under the name, "Twenty-Second Regiment Band."

" 5. I did not receive from said corporation any records marked with my name or with the name "Victor Herbert's Band" and I did not approve of any such records in a written testimonial or otherwise.

I have received numerous requests from phonograph companies and other parties for permission to use the name "Victor Herbert's Band" in connection with phonograph records or talking machine records, but I have invariably declined all such requests.

Sworn to before me this
6th day of February, 1904.

Wm. A. Angus

Notary Public
Eric D. M.



Fol. 1. SUPREME COURT: NEW YORK COUNTY.

-----Z
VICTOR HERBERT, :
Plaintiff, :
-against- :
UNIVERSAL TALKING MACHINE MANU- :
FACTURING COMPANY, :
Defendant. :
-----Z

CITY & COUNTY OF NEW YORK:SS

OTTO SCHREIBER, being duly sworn, says: That he has read the affidavits of Calvin G. Child, verified the 29th day of January, 1904; John A. McNabb, verified the 27th day of January, 1904, Anton Schliebusch, verified the 27th day of January, 1904, Charles Rech, verified the 27th day of January, 1904, and Henry B. Babson, verified the 28th day of January, 1904.

It is not true as alleged in the affidavit of John A. McNabb, that I am under the control of the Columbia Phonograph Company, or that I have inspired Mr. Herbert to start this action against the defendant. I have no monetary interest in the Columbia Phonograph Company, nor has any one connected with ^{the} company made any suggestion to me regarding this suit or the starting of the same, and I have no ill feeling toward any one connected with said ^{defendant} Company.

It is not true as alleged in the affidavit of Anton Schliebusch, that I played in the band called "Victor Herbert's Band" nor did I ever play in Eleventh Street for Mr. Leeds.

It is untrue as alleged in the affidavit of Charles Rech that I was the leader of a band that played for the Vitaphone Company at West 24th Street, under the name of "Victor Herbert's Band." I have never played at any time or place, or have been connected with any band known as "Victor Herbert's Band."

Fol. 4. It is untrue as alleged in the affidavit of Mr. Babson that I led a band in 1898 or 1899 calling itself "Victor Herbert's Band".

It is not true that I was sent by Mr. Herbert to play at the laboratory of the National Gramophone Corporation as alleged in the affidavit of Calvin G. Child. I have never represented Mr. Herbert in any capacity whatever and I have not played for the National Gramophone Corporation under the name of "Victor Herbert's Band." Nor did Mr. Herbert ever permit me to play under the name of "Victor Herbert's Band." I did with about seventeen to twenty men play for the National Gramophone Corporation the eight selections mentioned in the affidavit of Orville D. La Dow, under the name of the "Twenty-Second Regiment Band," of which Mr. Herbert was ^{then} the leader. I have never represented to any person in charge of the laboratory of the National Gramophone Corporation or any one connected with said corporation, that I was permitted to play as "Victor Herbert's Band."

Sworn to before me this :
4th day of February, 1904. :

Atw. Schneiker.

*Geo. C. Burbank,
Notary Public 187
New York County*

N. Y. Supreme Court.
New York County.

Victor Herbert,

VS.
Universal Sacking
Machine Manufacturing
Company.

Points on behalf of the de-
fendant on Plaintiff's motion
for a Preliminary Injunction.

OLNEY & COMSTOCK,
Attorneys for

Defendant

NO. 68 WILLIAM STREET,
NEW YORK, N. Y.

To.....

Attorney for.....

..... hereby admit due and sufficient service of the within.

Dated, New York.....

NEW YORK SUPREME COURT.

New York County.

----- x
Victor Herbert :
-against- :
Universal Talking Machine Manufacturing :
Company.

----- x
POINTS ON BEHALF OF THE DEFENDANT ON PLAINTIFF'S
MOTION FOR A PRELIMINARY INJUNCTION.

F i r s t P o i n t.

THE AFFIDAVITS OF THE DEFENDANT DENY THE EQUITIES
ALLEGED BY PLAINTIFF. IN SUCH A CASE A PRELIMINARY INJUNCT-
ION WILL NOT BE GRANTED.

The allegations of the plaintiff are to the effect
that the defendant made use of plaintiff's name without
his consent. That plaintiff has not at any time given
defendant any right so to do; and plaintiff further alleges
that the music produced is of an inferior kind.

The affidavits of Mr. Crandall, secretary of the
defendant, of Anton Schliebusch, the leader of what is
now called "Victor Herbert's Band", and of Frederick W.
Hager, an employee of the defendant in the record depart-
ment, sufficiently answer the allegations of plaintiff.

Mr. Crandall states that in May, 1900, Anton
Schliebusch called on him at the office of the defendant,

that he represented Victor Herbert, and produced a card of Herbert's authorizing Schliebusch to use his name in connection with a band of which said Schliebusch was manager, known as "Victor Herbert's Band". That Schliebusch had authority from Victor Herbert to style the band "Victor Herbert's Band". That Schliebusch solicited orders for the band to play for the defendant in making disc records for sale having selections marked "By Victor Herbert's Band". Thereupon defendant employed the band and paid them for their services. Defendant spent several thousand dollars in making matrices in reproducing the records of the selections to play in the band, and has on hand many thousands of such disc records. That many of the band had been members of the band which had been personally conducted by Victor Herbert before he went to Pittsburgh.

Schliebusch states in his affidavit that he was connected with the band personally conducted by Victor Herbert while he was leader in New York. The band led by Victor Herbert was known as Victor Herbert's 22nd Regiment Band. That he was connected for five years as sergeant of the band; that through such connection he knew Herbert very intimately; that as such sergeant his duties were in engaging musicians, attending to payment of their salaries, as well as playing the first tuba. That Victor Herbert went to Pittsburgh the latter part of 1899 for the purpose of conducting the Pittsburgh Orchestra. That Victor Herbert has never had a band since he gave up the 22nd Regiment Band. That he secured permission from Victor Herbert personally to use his name in connection with the band which he was organizing for the purpose of playing selections for making records for talking machine use. That he asked him verbally whether he could use his name in con-

nection with the band which he was organizing, so far as machine records for talking machines were concerned. That Herbert gave him permission and said "I could use his name "in connection with the band for making records for talking machines so long as I did it in a good way; that is, "as I understood him, so long as I employed good musicians, "and played good music." That part of his band were made up of musicians who were formerly with Victor Herbert's 22nd Regiment Band. That he always employed in the band good musicians and has never played anything but good music in making talking machine records. That the records which have been made by defendant from selections played by the band under the name of "Victor Herbert's Band" have been of very superior quality and tone.

Mr. Hager's affidavit states that he knows Schliebusch, and has known his band as "Victor Herbert's Band". That the records reproduced were all of a high grade and of superior quality and tone.

Unless we are to conclude that Schliebusch is guilty of wilful perjury, we must believe that his statement, which is altogether a probable one, is true, and that Mr. Herbert has forgotten the facts. It was natural that he should feel friendly towards Schliebusch, who had been his assistant for five years, and that on leaving New York he should have given to Schliebusch the permission which he asked. This privilege was a matter of some consequence to Schliebusch, and something that he would likely remember, while very probably Herbert considered it a matter of no special consequence to him, and dismissed the matter from his mind. The probabilities therefore are in favor of Schliebusch's statement.

As to the quality of the music produced, the affidavits of the defendant show that it was of a high order, and the allegation of the plaintiff to the contrary is more than overcome. Moreover, a circular advertisement of the defendant, annexed to the moving papers, and marked Exhibit A, contains a copy of a letter from Edourd de Reszke to the effect "the reproduction of the vocal and band selections is perfect".

On these grounds alone, therefore, the motion for a preliminary injunction should be denied, so far as such injunction is asked to effect anything that has been done by the defendant up to the time of the commencement of this action.

S e c o n d P o i n t.

THE PLAINTIFF IS ESTOPPED BY LONG ACQUIESCENCE FROM NOW SEEKING AN INJUNCTION AGAINST THE ACTS OF THE DEFENDANT.

Since May, 1900, the defendant has been making and advertising these records, using the words "By Victor Herbert's Band". Mr. Crandall's affidavit shows that these catalogues have been printed and circulated for a number of years past very widely throughout the United States, as well as in foreign countries, such catalogues being issued periodically and containing a complete list of the records manufactured and sold by it, the name of the selection engraved upon said record, as well as the name of the band or singer or recitationist producing the record, as the case may be.

It further states that when the band was first organized and matrices or dies had recorded the music made by it, and records made therefrom, a number of these records were sent to the said Victor Herbert. On information and belief Mr. Crandall alleges that Victor Herbert heard the same played upon either the Zonophone or the Victor talking machine, a similar instrument. That some of the members of the band thereafter played in the Pittsburgh orchestra led by Victor Herbert. That it is very improbable that under all the circumstances Victor Herbert should not have known the fact that the band was playing for defendant, and that defendant was making records and advertising them in the manner complained of. That the defendant from the beginning has assumed that to be the fact. No complaint was ever received from Victor Herbert.

In the original moving papers plaintiff does not state that he was not informed long since of the use by defendant of his name in connection with the band, but contents himself with the allegation that he never authorized its use. It is a well recognized principle that such a long and unaccounted for acquiescence is an answer to the claim for a preliminary injunction.

Third Point.

EQUITY WILL NOT INTERFERE BY INJUNCTION WHEN THE DAMAGE AND INJURY TO DEFENDANT FROM AN INJUNCTION IS GREATLY DISPROPORTIONATE TO ANY POSSIBLE DAMAGE LIKELY TO ACCRUE TO PLAINTIFF FROM THE CONTINUANCE OF THE ACTS COMPLAINED OF.

Such is the case here. The affidavit of Mr. Cran-dall shows that in entire good faith the defendant has expended large sums of money in producing and manufacturing these records, and has on hand many thousands of the disc records marked "By Victor Herbert's Band", as well as several hundreds of matrices made from said se-lections, and that to discontinue the use thereof would bring upon the defendant a loss of many thousands of doll-ars. What probable or possible injury can come to the plaintiff from the use of the words "Victor Herbert's Band" in the manner in which the same has been used by the defendant? The plaintiff alleges (fol.10) that he is not connected with any musical organization known as "Victor Herbert's Band"; therefore the element of compe-tition does not come in. Defendant is not manufacturing any records in competition with Victor Herbert. Plain-tiff says that the unauthorized use of his name is injur-iouss to plaintiff's professional standing and reputation, and offensive to his feelings. It is not easy to see how, if the music produced is of a high order; and that's the overwhelming evidence on the question, how his professional reputation and standing can be injured. His damages and injury, it is plain, are purely fanciful; but if the

defendant is enjoined in disposing of these large quantities of goods which they have in good faith, and in entire innocence manufactured, a large loss amounting to several thousand dollars, which can be easily calculated and proved, will be entailed upon the defendant. In such a case a court of equity will not grant a preliminary injunction.

Fourth Point.

IT IS QUITE CLEAR FROM AN EXAMINATION OF THE CASE OF ROBINSON v. ROCHESTER COMPANY, 171 N. Y., 545, THAT THE PLAINTIFF HERE WOULD HAVE NO CAUSE OF ACTION WHATSOEVER WERE IT NOT FOR CHAPTER 132 OF THE LAWS OF 1903.

This Act did not become a law until April 6, 1903. It is penal in its nature, and therefore must be strictly construed, and cannot be held to be retroactive. Whatever the defendants have done, therefore, prior to April 6, 1903, cannot be called in question now.

The right of the plaintiff, if any he has, to an injunction, is conferred by Section 2 of the Act. That section gives him the right to maintain an equitable action in the Supreme Court to prevent and restrain the use of his name.

The remarks of the Court of Appeals in the Robinson case, supra, plainly indicate that even under an enactment of the legislature, of this nature, the established rules governing injunctions must still be regarded by the courts in construing such an Act.

But plaintiff is not as a matter of course, by reason of this statute, entitled to a preliminary injunction. Defendant is still protected by well established rules governing courts of equity, in granting relief by injunction. Hence, if the plaintiff has acquiesced in the use of his name by the defendant, the motion must be denied. If the damage likely to be imposed on the defendant by reason of the injunction is vastly greater in proportion to the probable damage to plaintiff by reason of the defendant's acts, the motion for a preliminary injunction must be denied in this, as in other cases.

The application of these well known rules of equity demand that the motion for a preliminary injunction should be denied.

This question more frequently arises under the patent laws.

See Bump Patent Trade Marks, &c., p. 292.

"The court will regard the comparative expense and inconvenience to which the parties will be subjected in case of granting the injunction on the one hand or withholding it on the other, and if the effect of granting an injunction will be very injurious and the refusal will subject the complainant to a comparatively slight inconvenience, the preliminary injunction will be refused."

Citing many cases.

8 Blatchford, 533.

12 Blatchford.

Rake v. Bradley Co., 12 Blatchford, 202.

Castle Co. v. City Cable Ry. Co., 42 Fed. Rep. 685.

Hoe v. Boston Daily Advertiser, 14 Fed. Rep. 914.

The replying affidavit of Mr. Herbert admits that Anton Schliebusch was the sergeant of the band, and that his duties were to engage musicians and attend to the

payment of the salaries of the members of the band, referring to Herbert's 22nd Regiment band (fol.3). It denies that he authorized Schlisbusch to use the name "Victor Herbert's Band". At folio 5 deponent says that he never saw any records manufactured by the defendant, nor any of its circulars, pamphlets or advertisements until the latter part of November, 1903. In this he must be mistaken because by the affidavit herewith filed of Crandall, secretary of the company, and the affidavits of LaDow and Hepper it is shown that the records in question were sent to Victor Herbert at Pittsburgh and that the defendant asked for an expression of opinion as to the records, and that they received a letter from Herbert highly commanding the records, and that that letter with the photogravure signature of Mr. Herbert was published in "The Gramophone Record", a monthly publication then in the charge of Mr. Hepper.

Our answering affidavits show that the music which Victor Herbert calls "ragtime" music is a popular music of a good character, and in fact is played by high class orchestras and first class bands.

F I F T H P O I N T.

ALL THAT THE DEFENDANTS HAVE DONE PRIOR TO APRIL 6th, 1903, WAS ENTIRELY LEGAL, AND THERE CAN BE NO DOUBT THAT WHAT THEY DID WAS DONE IN ENTIRE GOOD FAITH.

In any point of view therefore, if the court should grant a preliminary injunction for any purpose, it should be confined entirely to the future, and should

provide that the defendants should have the liberty to dispose of the numerous records manufactured by them and put upon the market prior to April 6th, 1903.

Defendant's answering affidavit of Mr. Macnabb, at folio 2 shows that of 350 matrices about 70 were made subsequent to April 6th, 1903, and all the rest made prior thereto, and that they have 20,000 records on hand pressed from these matrices, of which 20,000 two-thirds were pressed prior to April 6th, 1903. At folio 12 Mr. McNabb says that the defendant has invested in the matrices in question about \$7,000, and that if the court should enjoin defendant from making use of the matrices and records as asked for by the plaintiff, it would be a damage to defendant of not less than \$10,000.

Mr. Macnabb at folio 4 to 9 speaks of an interview that he had with Herbert in Pittsburgh on January 23rd instant. At folio 6 Herbert said "that he probably had told Schliebusch that he might advertise his past connection with his, Victor Herbert's band, and that Schliebusch might have inferred from that that he gave him the permission to use his name, but that he did not believe Schliebusch would intentionally do anything dishonest."

At folio 7 to 8 Mr. Macnabb says that at this interview he told Herbert "that it was strange that the first he knew of the matter was in December, 1903, because our Zonophones and records had been prominently displayed in Mr. Mellon's store in Pittsburgh and in the store of the Pittsburgh Phonograph Company, and also in the music store of Mr. Samuel Hamilton, where tickets for Victor Herbert's concerts in Pittsburgh were sold", and that "if he went into these places as I knew he did, he must see the Zonophones

and must have seen his name displayed in connection with them. He said that that might have been so, but that his mind was not impressed with it and he had not paid particular attention to it, and that he only began to think of it after Schreiber suggested the matter to him."

Mr. Macnabb stated in his affidavit that during the past year defendants have sold from 15,000 to 20,000 records in Pittsburgh alone, a great many of them bearing Victor Herbert's name. That the records are being constantly played upon the Zonophone in music houses in Pittsburgh.

Mr. Crandall at folio 2 of the defendant's answering affidavit says: "I sent by post samples of these records to Victor Herbert at his address given me by Schliebusch. My recollection is that they were sent by post to Mr. Herbert care of Carnegie Hall, Pittsburgh, Pennsylvania."

Mr. Schliebusch having read Mr. Herbert's, Mr. Clayton's and Mr. Schrieber's replying affidavits, states, "I can only repeat what I have already stated and that is that Mr. Herbert gave me permission to use his name in connection with the band."

Mr. Rech, a musician, swears that shortly prior to the time when Mr. Herbert went to Pittsburgh he played in his, Victor Herbert's band; that he has played in other bands called Victor Herbert's band which were not conducted personally by Mr. Herbert. "In one case we played for Leeds a manufacturer of phonograph records, and also in a band called the Victor Herbert band for a company which made records", the name of the company being, he thinks, the Vitaphone Company, and the leader of this

band was Otto Schreiber, who has made an affidavit herein for Mr. Herbert. Other members of these bands had also been members of the 22nd regiment band which Victor Herbert led."

He says "that Mr. Henneberg, who is an assistant manager or connected with the Pittsburgh orchestra which Mr. Herbert now leads, conducted a band which was advertised and called and known as Victor Herbert's band but which was not conducted personally by Mr. Herbert and that this band played for a whole season at Terrace Garden, 58th street and Third avenue, advertising itself as Victor Herbert's band."

Mr. Hager says that it was a matter of common knowledge to all musicians that bands were playing under the name of Victor Herbert's band.

We submit, in considering all the notoriety given to the matter in so many different ways, it is practically impossible that Victor Herbert was ignorant of this matter until November or December last.

S i x t h P o i n t.

AS WE HAVE SAID, HERBERT'S DAMAGES ARE PURELY FANCIFUL.

It is difficult to imagine how he can possibly prove damages in any substantial amount. In any event there is no claim that the defendant is insolvent, and as a matter of fact defendant is prosperous and abundantly

able to respond to any damages the plaintiff may prove.

The defendant is prepared to stipulate, as a condition of denial of the motion for a preliminary injunction, that it will desist from further distributing any of its printed circulars advertising records by Victor Herbert's band, and will make no further matrices or records marked "by Victor Herbert's band".

We submit that the defendant ought not to be subjected to a loss of \$10,000 by being enjoined from making use of the matrices already on hand, and from disposing of the records already made.

All of which is respectfully submitted.

N.Y. Jan'y 28. 1904
Attorney
Counsel for def't

A. Y. Supreme Court.
New York County

Victor Herbert

vs.
Universal Talking Machine
Manufacturing Company

Notice of application for leave
to submit additional affidavits
in opposition to motion for injunction

OLNEY & COMSTOCK,
Attorneys for

Defendant

No. 68 WILLIAM STREET.
NEW YORK, N. Y.

To Adversaries by defendant
to same time and place
Engd. St. for

hereby admit due and sufficient service of the within.

Dated, New York,

MAR 11 1904

Copy received
Feb. 2 1904

Nathan Burkman
Atty for plff

S U P R E M E C O U R T ,
N E W Y O R K C O U N T Y .

-----x
VICTOR HERBERT)
)
)
vs.)
)
)
UNIVERSAL TALKING MACHINE)
MANUFACTURING COMPANY.)
)
)
-----x

SIRS:

PLEASE TAKE NOTICE, That we shall submit the
Affidavits ~~enclosed~~, copies of which have this day been served
upon you, with the exception of the Original Publication at-
tached to the Affidavit of Orville D. La Dow, and of which we
have no other copy, to Mr. Justice Leventritt, at his Chambers,
in the County Court House, in the Borough of Manhattan, in the
City of New York, on the ~~5th~~ day of February, 1904, at
10 A. M., and ask that the same be read by him in opposition
to the Motion~~s~~ made by **you** for an Injunction pendente lite.

DATED, NEW YORK,

Yours, etc.,

OLNEY & COMSTOCK,
Defendant's Attorneys.

TO

NATHAN BURKAN, ESQ.,
Plaintiff's Attorney.

Herbert

— v —

Universal Talking
Machine Manufacturing
Company.

Memo.

3. 8. 84

Supreme Court Special Term. Part I

Herbert

Universal Talking Machine Company

Leventritt, J.

I am of the opinion that the plaintiff brings himself squarely within the provisions of Ch. 132 of the Laws of 1903 giving a person whose name is used for advertising purposes or for the purpose of trade without written consent first obtained the right to maintain an equitable action to restrain the use, and recover damages for any injuries sustained by reason of ~~such~~ ^{of his name} use. The defendant ~~use~~ may well be innocent of any intentional unauthorized use of the plaintiff's name in advertising its wares, but the Statute does not make ~~an~~ intent an element. On the papers, as submitted, I am satisfied that the plaintiff never gave the claimed permission, that the person who represented that he had such authority did not have it and that the defendant in relying on his patently insufficient credentials did so at its own risk.

The defendant does not establish

trade or advertising. No question of defendant's good faith is necessarily involved; ~~they~~ it may well have been dispensed. But the plaintiff is entitled to the relief which the Statute, passed to remedy a theretofore irremediable injustice (Robertson v. Rochester Holding Box Co. 171 N.Y. 545) was intended to give. The injunction should issue.

Supreme Court

Victor Herdt

against

Universal Talking
Machine Mfg. Co.

Applicant

Victor Herdt
Albion Ryff
99 Hanson St.
New York City

MAR 11 1904

21.—Affidavit of Service.

U.S.A.F.

John Polhemus Printing Company, Printers and Mfg Stationers,
221 Fulton St., New York.

N.Y. Supreme Court

Victor Herbert

Plaintiff

Universal Talking Machine Manufacturing Company against
defendant

County of New York

Affidavit of Service of Summons and Complaint.

being duly sworn, says, that he is over 21 years of age.

And that on the 9th day of March 1904 at No. 68 William

Street, Borough of Manhattan, City of New York. he
~~he served the summons and complaint in this action, hereinafter annexed, upon~~
~~the annexed order and notice of settlement~~
~~upon Olney & Townstock, attorneys for defendant~~
~~in action by delivering true copy thereof to a person in charge~~
~~of said attorneys, said office not paid attorneys were~~
~~defendant in this action, by delivering a true copy of said summons and complaint to such~~
~~absent from New York at the time of service. He further says,~~
~~that he knew the person served as aforesaid to be~~
~~the person mentioned and described~~
~~in the said summons as~~
~~defendant in this action.~~

Sworn to before me, this 9th day of March, 1904.

Charles Koseff

Hugo Vogt
Notary Public in N.Y.C.

SIR:

Please take notice that the within is
a copy of an Order which will be
submitted for signature to Mr.
Justice ~~Devanport~~ at Special ~~the day~~
Term Part I at the County Court House
~~Borough of Manhattan, City of New York~~
on the 11 day of March 1904 at
10¹⁵ o'clock a.m.

Dated, New York, March 8th 1904

Yours, etc.,

NATHAN BURKAN,

Attorney for plaintiff

To

Ulney & Tompkins Esq's

Attorney for defendant

114
N.Y. Supreme

Victor Herbert

PLAINTIFF,

AGAINST

Universal Talking
Machine Manufacturing
Company

DEFENDANT.

Order

and
Notice of Settlement.

NATHAN BURKAN,

ATTORNEY FOR plaintiff

99 NASSAU STREET,

BOROUGH OF MANHATTAN,
NEW YORK CITY.

To

DUE SERVICE OF A COPY HEREOF IS HEREBY ADMITTED.

DATED, NEW YORK, March 1904

Plaintiff's ATTORNEY.

MAR 11 1904

vol. 1.

At a Special Term of the Supreme Court of the State of New York, held in and for the County of New York, at Part I at the County Court House, in the Borough of Manhattan, City of New York, on the 11 day of March, 1904.

Present:

Hon. David Leventritt,
Justice.

-----Z

VICTOR HERBERT, :
Plaintiff,

-against- :

UNIVERSAL TALKING MACHINE
MANUFACTURING COMPANY, :
Defendant.

-----Z

" 2. An order to show cause having been granted herein, dated January 13th, 1904, directed to the defendant, why an injunction order should not be made restraining, during the pendency of this action, the defendant, its officers, agents and servants and all persons having notice of the injunction, from manufacturing, selling, exhibiting or offering for sale, circulating or disposing of any machines or records containing the words "By Victor Herbert's Band" or "Victor Herbert's Band" or the name of the plaintiff printed or inscribed thereon, and from printing, issuing, publishing, distributing or circulating any pamphlets, circulars or advertisements

" 3. containing the words: "By Victor Herbert's Band" or "Victor Herbert's Band" or the plaintiff's name in connection with any machines or records, and from using plaintiff's name in any manner in their business or trade ^{or} advertisements or in furtherance thereof; and the said motion having come on to be heard before this Court;

Now, on reading and filing the order to show cause, dated January 14th, 1904, the summons, dated January 14, 1904, and the complaint verified January 9th, 1904, and Exhibit "A"

Fol. 7. containing the words "By Victor Herbert's Band" or "Victor Herbert's Band" or the name of the plaintiff printed or inscribed thereon and from printing, issuing, publishing, distributing or circulating any pamphlets, circulars or advertisements containing the words "By Victor Herbert's Band" or "Victor Herbert's Band" or the plaintiff's name in connection with any machines or records, and from using plaintiff's name in any manner in their business or trade or advertisements or in aid or furtherance thereof.

And it is further ordered that the plaintiff execute and file an undertaking in the sum of One thousand " 8. dollars with two sufficient sureties to be approved by the Court, conditioned for the payment of any damages the defendant might sustain by reason of this injunction order in the usual form provided by the statute; and that this injunction become effectual from the date of the filing and approval of said undertaking and the service of a copy thereof on the defendant's attorneys.

E N T E R

David Leocutull
D.L.

PL. CO 1904-H 304

SIR:

Please take notice that the within is
a copy of an
this day
duly entered and filed in the office of
the Clerk of the

Dated, New York,

Yours, etc.,

NATHAN BURKAN,

Attorney for.....

To

Esq.

Attorney for.....

294
N.Y. Supreme COURT.

Victor Herbst

PLAINTIFF,

AGAINST

Universal Talking
Machine Manufacturing
Company

DEFENDANT.

Consent and
Decree.

NATHAN BURKAN,

ATTORNEY FOR plaintiff
99 NASSAU STREET.

BOROUGH OF MANHATTAN,
NEW YORK CITY.

To

DUE SERVICE OF A COPY HEREOF IS HEREBY ADMITTED.

DATED, NEW YORK,

..... ATTORNEY.

Folio 1.

AT a Special Term of the Supreme Court of
the State of New York, held in and for the
County of New York, at the County Court
House, in the Borough of Manhattan, City
of New York, on the ~~19~~ day of October, 1904.

PRESENT:

HONORABLE EDWARD E. McCALL,
JUSTICE.

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VICTOR HERBERT,)
)
)
Plaintiff,)
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)
-Against-)
)
)
UNIVERSAL TALKING MACHINE MAN-)
UFACTURING COMPANY,)
)
Defendant.))
-----X

" 2. This Action having been commenced by the personal service of the Summons and Complaint upon the defendant corporation, and the defendant above named having duly appeared and answered, and the defendant having consented to the entry of the following Judgment; now, on reading and filing the Summons and Complaint, and the Answer, and the annexed Consent, it is, on Motion of Nathan Burkman, Attorney for Plaintiff,

ORDERED, ADJUDGED, AND DECIDED, That the defendant, its officers, agents, and servants, and all persons having notice of this decree, be, and they hereby are forever enjoined and restrained from manufacturing, selling, exhibiting, or offering for sale, circulating or disposing of any machines, discs, or records containing the words: "By Victor Herbert's Band", or "Victor Herbert's Band", or the name of the Plaintiff, printed or inscribed thereon, and from printing, issuing, pub-

lishing, distributing, or circulating any pamphlets, circulars, or advertisements, containing the words: "By Victor Herbert's Band", or Plaintiff's name, in connection with any machines or records, and from using Plaintiff's name in any manner in their business or trade, or advertisements, or in aid or in furtherance thereof.

Folio 4. AND IT APPEARING that the Plaintiff and the Defendant have fully satisfied each other as to the Damages and Costs,

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, That the Plaintiff recover no Damages or Costs of the defendant.

IT IS FURTHER ORDERED, That the Undertaking on Injunction filed herein by the Plaintiff on March 23, 1904, be cancelled, and that the Sureties thereon be discharged from any and all liability.

ENTER



SUPREME COURT OF THE STATE OF NEW YORK,
NEW YORK COUNTY.

-----X
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)
VICTOR HERBERT,)
)
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PLAINTIFF,)
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-AGAINST-)
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)
UNIVERSAL TALKING MACHINE MANU-)
FACTURING COMPANY,)
)
DEFENDANT.)
)
)
-----X

WE, The Attorneys for the Plaintiff and the Defendant herein, and also the defendant, HEREBY CONSENT to the entry of the annexed Decree, without further notice, as the Final Decree herein, the Plaintiff and Defendant having fully satisfied each other as to the Damages and Costs herein, and the Plaintiff having released the defendant of and from any liability therefor.

DATED, NEW YORK, SEPTEMBER 30th 1904.

Nathan Burkam
PLAINTIFF'S ATTORNEY.

Oliver T. Coniswock
DEFENDANT'S ATTORNEY.

Universal Talking Machine Co.
Henry B. Bray
DEFENDANT.

COUNTY OF NEW YORK, ss:

ON this 29th day of September, 1904, before me
came Henry B. Babson to me known, who,
being by me duly sworn, did depose and say, that he resided in
Bronxville, Bronx County, New York; that he is the President
of The Universal Talking Machine Manufacturing Company, the
Defendant Corporation above named, and the Corporation described
in, and which executed the above Consent; that he knew the Seal
of said Corporation; that the Seal affixed to said Consent was
said Corporate Seal; that it was so affixed by order of the
Board of Directors of said Corporation, and that he signed
his name thereto by like order.

Gustav Lang Jr.
Notary Public
Bronx County